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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

SAGINAW MINING COMPANY,
Petitioner,

v.

LEWIS GIBAS,
Claimant-Respondent,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,

and

THE BENEFITS REVIEW BOARD,
Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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APPENDIX

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 83-3408

LEWIS GIBAS,

Petitioner,

v.

SAGINAW MINING COMPANY; DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS; and BENEFITS REVIEW BOARD,

Respondents.

On Petition for Review of an Order of the Benefits Review Board

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Decided and Filed November 26, 1984

Before: MARTIN and KRUPANSKY, Circuit Judges; and MCRAE, Chief District Judge.*

BOYCE F. MARTIN, JR., Circuit Judge. The question presented is whether the Benefits Review Board, an administrative tribunal within the Department of Labor, is vested with the adjudicatory authority to declare invalid a regulation of the Secretary. Additionally, we are asked to determine whether, if the Board has such power, that power was properly exercised in this case.

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* Honorable Robert M. McRae, Jr., Chief United States District Judge for the Western District of Tennessee, sitting by designation.

Lewis Gibas, a fifty-nine-year-old coal miner, petitions for review of a final decision by the Benefits Review Board, United States Department of Labor, denying him benefits under the Black Lung Benefits Act, 30 U.S.C. § 901 et seq. The Board's decision reversed a determination by an administrative law judge who had awarded Gibas benefits for disability resulting from pneumoconiosis.[1] The Director, Office of Workers' Compensation Programs, of the Department of Labor supports Gibas' petition;[2] his employer, Saginaw Mining Company, opposes it. This court has jurisdiction under 33 U.S.C. § 921(c) (1976).

Gibas was born on November 8, 1924. He has an eighth-grade education. He worked as a coal miner with Saginaw for twenty-four years. He left Saginaw on June 24, 1978 due to a heart ailment. He has not worked since then.

On May 1, 1977, Gibas applied for benefits under the Black Lung Benefits Act, 30 U.S.C. § 901 et seq. The Department of Labor found him eligible for benefits and named Saginaw as the employer responsible for payment of the benefits. Saginaw challenged this decision, and an administrative hearing was held. After the hearing, the administrative law judge found Gibas disabled and entitled to benefits. The judge concluded that Gibas had successfully invoked the interim presumption of 20 C.F.R. § 727.203(a) (1984). Under that provision, an individual with ten years of coal mine employment "will be pre-

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[1] Pneumoconiosis is "a disease of the lungs caused by the habitual inhalation of irritant mineral or metalic particles." *Webster's New Collegiate Dictionary*, p. 878 (1981). *See Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 6-7 (1976).

[2] The Director is permitted to seek review of Board decisions in the courts to "ensure proper and consistent administration" of the Act. *Shahady* v. *Atlas Tile & Marble Co.*, 673 F.2d 479, 483 (D.C. Cir. 1982) (per curiam). *See also Director, OWCP* v. *Eastern Coal Corp.*, 561 F.2d 632, 641-49 (6th Cir. 1977).

sumed to be totally disabled due to pneumoconiosis . . . arising out of that employment" if: (1) x-rays establish the existence of pneumoconiosis, (2) ventilatory tests indicate the existence of a chronic respiratory or pulmonary disease, or (3) blood gas studies demonstrate the presence of a transfer of oxygen impairment. 20 C.F.R. § 727.203(a)(1)-(3) (1984). In particular, the judge found that Gibas had introduced sufficient x-ray evidence to satisfy the requirement of section 727.203(a)(1). The judge relied on the x-ray report of Dr. J. S. Gordonson, a B-Reader,[3] which revealed a positive test for pneumoconiosis. The judge concluded that Gibas' complaints of shortness of breath, first reported in 1965, and length of employment as a coal miner, when considered with Dr. Gordonson's x-ray reading, established a rebuttable presumption of disability due to pneumoconiosis.

The administrative law judge rejected Saginaw's contention that it had introduced sufficient medical evidence to rebut the presumption of disability pursuant to 20 C.F.R. § 727.203(b)(3) (1984). Under this provision, Saginaw was required to submit "evidence establish[ing] that the disability . . . of the miner did not arise *in whole or in part* out of coal mine employment." 20 C.F.R. § 727.203(b)(3) (1984) (emphasis added). In support of its assertion Saginaw argued that the report of Dr. George Kress, which opined that Gibas' disability was due to cardiovascular disease, and not pneumoconiosis, satisfied the rebuttal test of section 727.203(b)(3). The administrative law judge, however, disagreed. He noted:

> It is recognized that the claimant has serious cardiovascular problems, that these problems led to his retirement in June 1978 and contribute to his present shortness of breath and that apparently his pneu-

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[3] "B-readers" have the greatest expertise and training for evaluating x-rays. *See Hatfield* v. *Secretary of Health and Human Services*, 743 F.2d 1151, 1154 n.3 (6th Cir. 1984).

moconiosis by itself, did not prevent him from working in June 1978 or earlier. However it is also true that the claimant has penumoconiosis, [sic] that penumoconiosis [sic] is a progressive and irreversible disease, that it could have continued to progress in severity, in the claimant's case, after June 1978 and that Dr. Del Vecchio found evidence of small airway disease in January 1980.

In view of the facts that the claimant worked in coal mines about 24 to 29 years under dusty conditions, that his May 1979 x-ray shows simple pneumoconiosis and that he is clearly disabled by conditions including shortness of breath, I believe that it would be unduly speculative to attribute all of his disability to his cardiovascular impairment and none of it to his pneumoconiosis, and I decline to do so. I conclude that the evidence fails to show that the claimant's present disability, during the period since May 1979, does not arise at least in part from his pneumoconiosis, or that he would now be able to do his previous coal mine work as far as any pulmonary or respiratory impairment is concerned. (No showing has been made as to the availability of comparable and gainful work.)

In view of the foregoing, it is concluded that the employer has not rebutted the interim presumption of totally disabling pneumoconiosis and that the claimant is entitled to benefits.

Saginaw then appealed to the benefits Review Board, which reversed. The Board, although upholding the administrative law judge's finding that Gibas had successfully invoked the interim presumption of section 727.203 (a) (1), nonetheless reversed because the judge had applied section 727.203 (b) (3) as written, rather than as rewritten by the Board in its decision in *Jones* v. *The*

New River Company, 3 Black Lung Rep. 1-199 (1981).[4] In *Jones*, the Board found that the "in whole or in part" language of section 727.203(b)(3) was inconsistent with 30 U.S.C. § 901(a) and 902(f)(1) (Supp. V 1981). The Board held section 727.203(b)(3) invalid "insofar as it permits awards for disability caused only in part by diseases arising out of coal mine employment." *Jones*, 3 Black Lung Rep. at 1-208. In the Board's view, section 727.203(b)(3), as written by the Secretary, permits awarding benefits "to claimants who are *only partially* disabled due to pneumoconiosis" when it requires that the employer "show that *no part* of the total disability arose out of coal mine employment." *Id.* at 1-208-209. Because the Black Lung Benefits Act provides benefits only to those who are "totally disabled due to pneumoconiosis," 30 U.S.C. § 901, the Board felt that any regulation that allowed for disability resulting in part from pneumoconiosis was not in accordance with the law. Consequently, the Board ruled that the words "in whole or in part" should be stricken from the regulation. Under the Board's revised provision, a presumption of disability would be rebutted under section 727.203(b)(3) "if it is shown that total disability . . . did not arise out of coal mine employment." *Jones*, at 1-209.

Applying the *Jones* ruling to Gibas' claim, the Board concluded that the administrative law judge had erred when he measured Saginaw's rebuttal evidence under the regulation as written by the Secretary. The Board then noted that the judge had erred in rejecting Dr. Kress' opinion that Gibas' disability was totally due to heart disease. The Board found that Dr. Kress' report was based upon sufficient documentation and uncontradicted

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[4] Because the Board ruled that the administrative law judge had erred in his interpretation of section 727.203(b)(3), it did not reach Saginaw's other contentions that it had also rebutted the presumption pursuant to 727.203(b)(2) and (b)(4). Saginaw has not reasserted these contentions here.

by other medical evidence. Thus the Board held that "the interim presumption [was] rebutted pursuant to 20 C.F.R. § 727.203(b)(3) as a *matter of law*." (emphasis added).[5]

Both the Director and Gibas contend that the Board lacked the statutory or constitutional authority to invalidate the Secretary's regulation. Alternatively, they contend the Board has misinterpreted section 727.203(b)(3). Gibas also asserts that Saginaw has not satisfied its burden of refuting the interim presumption claimed under 727.203(a)(1). Saginaw, on the other hand, argues that the Board did not act beyond its authority when it declared section 727.203(b)(3) invalid; it further argues that there is not substantial evidence in the record to support the administrative law judge's determination that Gibas is disabled due to pneumoconiosis.

Congress adopted the Black Lung Benefits Act in response to the significant number of coal miners who were disabled due to pneumoconiosis as a result of extended employment in the nation's underground coal mines. The purpose behind the enactment of the Act was to "provide benefits, in cooperation with the States, to coal miners who are totally disabled due to pneumoconiosis and to the surviving dependents of miners whose death was due to such disease." 30 U.S.C. § 901. Under the Act, the Secretary of Labor was given the authority to establish regulations and guidelines for determining whether a coal miner's pneumoconiosis "arose out of em-

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[5] As we read the Board's decision, the administrative law judge erred because he failed to apply section 727.203(b)(3) as rewritten by the Board in *Jones* v. *The New River Company*, *supra*. We therefore disagree with Saginaw's contention that the Board issued an additional, alternative ruling that the presumption was rebutted even under 727.203(b)(3) as written by the Secretary, notwithstanding the *Jones* ruling. In other words, without the Board's revision of section 727.203(b)(3), the administrative law judge properly found Gibas entitled to benefits and Saginaw has failed to rebut the presumption of disability.

ployment in a particular underground coal mine or mines." 30 U.S.C. § 932(h).

In 1972 Congress amended the Longshoremen's and Harbor Workers' Compensation Act of 1927, as amended, 33 U.S.C. § 901, to provide a new administrative process for benefits requests under several federal workers' compensation programs. *See* S. Rep. No. 1125, 92d Cong., 2d Sess. 13-15. The Black Lung Benefits Act was one of the compensation programs affected by the amendments. *See Director, OWCP v. National Mines Corp.*, 554 F.2d 1267, 1272-73 (4th Cir. 1977). Before the 1972 amendments, deputy commissioners adjudicated requests for benefits. The decision of the deputy commissioners were then reviewable by the district courts, with further review available in the courts of appeals. The 1972 amendments altered this procedure and vested the formal adjudication of benefits requests in administrative law judges, 33 U.S.C. § 919(d), who resolve the initial factual and legal issues presented in each case.

The 1972 amendments also established a three-person Benefits Review Board to review the determinations of the administrative law judges. 33 U.S.C. § 921(b)(3). Under the new procedures, the Board was placed "*within* the Department of Labor," S. Rep. No. 1125, *supra*, at 13-14 (emphasis added), to provide an internal administrative body for the review of benefits requests. As described by the Secretary's own regulations, "the functions of the . . . Board are quasi-judicial in nature and involve review of decisions made in the administration" of the Act. 20 C.F.R. § 801.103 (1984). Congress expressly granted the Board the authority to hear and decide appeals raising a substantial question of law or fact. 33 U.S.C. § 921(b)(3). However, the Board may not engage in *de novo* review of an administrative law judge's determination. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1037 (5th Cir. 1981). Also, an administrative law judge's findings of fact and conclusions of law

may only be set aside by the Board if not supported by substantial evidence, or not in accordance with the law. 20 C.F.R. § 802.301 (1984); *Director, OWCP* v. *Rowe*, 710 F.2d 251, 254 (6th Cir. 1983). Thus the Board "performs a review function identical to that which the District Courts performed prior to the 1972 amendments." *Kalaris* v. *Donovan*, 697 F.2d 376, 382 (D.C. Cir.), *cert. denied*, —— U.S. ——, 103 S. Ct. 3088 (1983). Rulings of the Board are appealable to the courts of appeals. Our review is limited to "scrutiniz[ing] Board decisions for errors of law and for adherence to the statutory standard governing the Board's review of the administrative law judge's factual determinations." *Director, OWCP* v. *Rowe*, 710 F.2d at 254 (quoting *Bumble Bee Seafoods* v. *Director, OWCP*, 629 F.2d 1327, 1329 (9th Cir. 1980)).

The Director and Gibas assert that the Board lacks the authority to declare the Secretary's regulations invalid. They argue that because the Board is not an Article III court, *see Kalaris* v. *Donovan*, 697 F.2d at 386, and its members are appointed at the Secretary's discretion, *id.* at 401, it lacks the authority to declare a regulation invalid. They contend the Board was established only to administer Department of Labor policy. Under this view, the Board is seen as one of two "arms" of the Secretary—the other being the Director—that were created to administer and implement the Secretary's policies under the Act. Permitting the Board to invalidate the Secretary's regulations, they argue, would create administrative obstacles to effective implementation of the Act and undermine the Secretary's policymaking authority.

Although the Supreme Court has not directly spoken on the authority of the Benefits Review Board to declare one of the Secretary's regulations invalid,[6] several other

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[6] We do not consider the dicta in *Potomac Electric Power Co.* v. *Director, OWCP*, 449 U.S. 268, 278 n.18 (1980), that the Board is not a policymaking agency to be dispositive on the issue presented here.

courts have suggested that administrative bodies like the Board do not have the authority to adjudicate the validity of legislation which they are charged with administering. *American Stevedores, Inc.* v. *Salzano*, 538 F.2d 933, 936 (2d Cir. 1976); *Finnerty* v. *Cowen*, 508 F.2d 979, 982 (2d Cir. 1974); *Downen* v. *Warner*, 481 F.2d 642, 643 (9th Cir. 1973). The appropriate analysis for determining this issue is set out in *Panitz* v. *District of Columbia*, 112 F.2d 39 (D.C. Cir. 1940). There Judge (later Justice) Vinson ruled that a court should first ask whether the agency has the inherent power to rule on the objections to the legislation. Next, a court should ascertain if the act, or regulations adopted pursuant thereto, purport to vest the agency with the authority to rule on challenges to the legislation. *Panitz*, 112 F.2d at 41-42. Applying the *Panitz* test here, we find first that the Benefits Review Board does not have the inherent authority to rule on the validity of the Secretary's regulations because it is not an Article III court. *See Kalaris* v. *Donovan*, 697 F.2d at 384-89. Under our constitutional system, "[t]he judicial power of the United States [is] exercised by courts having the attributes prescribed in Article III of the Constitution." *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 59 (1982). Those attributes are:

> The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Art. III, § 1. Here, it is undisputed that Board members do not enjoy the benefits of life tenure and the guarantee against salary diminution. Moreover, other "essential attributes of the judicial power" were not vested in the Board, including the power of subpoena, the power to hold an individual for contempt and the power to have its order enforced. 33 U.S.C. §§ 927, 921(d).

Additionally, courts have refused "to recognize in administrative officers any inherent power to nullify legislative [or executive] enactments because of personal belief that they contravene the [C]onstitution." *Panitz*, 112 F.2d at 42 (footnote and citations omitted). Rather, administrative agencies are vested only with the authority given to them by Congress. *Cf. Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 213-14 (1976) (rulemaking authority of an administrative agency in charge of administrating federal statute is not the power to make law); *Social Security Board* v. *Nierotko*, 327 U.S. 358, 369 (1946) (an administrative agency may not finally decide the limits of its statutory power; this is a judicial function).

We do conclude, however, that Congress has vested the Board with the statutory power to decide substantive questions of law, *see* 33 U.S.C. § 921(b)(3), and we therefore find that the Board did not act beyond its authority in ruling on the validity of 20 C.F.R. § 727.203 (b)(3).

Our determination is supported by the clear statutory language of 33 U.S.C. § 921(b)(3), which expressly authorizes the Board "to hear and determine appeals raising a substantial *question of law* or fact." (emphasis added). The Secretary has advanced no reason why this positive grant of authority should be narrowly construed to preclude the Board from ruling on the validity of the challenged regulation. The power to decide "substantial question[s] of law," in our view, clearly implies the power to determine whether a regulation is in accord with the Act.

It is equally clear that the Board was established to fulfill the review function previously performed by the district courts. *Nacirema Operating Co., Inc.* v. *Benefits Review Board*, 538 F.2d 73,75 (3d Cir. 1976); Currie & Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 Colum. L. Rev.

13, 36-37 (1975). Surely Congress anticipated that the Board would be called upon to decide substantive legal issues in its role as an appellate tribunal under the Act. Without this additional layer of appellate review, the courts of appeals would be confronted with cases which had not undergone the "screening procedure" previously provided by the district courts.

Concededly, the Board, like the district courts under the earlier law, is granted limited authority in its review of administrative determinations. 33 U.S.C. § 921(b)(3). "It is not empowered to engage in a *de novo* review but rather is limited to reviewing the [administrative law judge's] decision for errors of law and to determine whether the factual findings are supported by substantial evidence in the record viewed as a whole."[7] *Director, OWCP* v. *Rowe*, 710 F.2d at 254. Nonetheless, the composition and operating procedures of the Board are akin to a judicial forum. Board members are appointed by the Secretary "from among individuals who are especially qualified to serve" on the Board. 20 C.F.R. § 801.201 (1984). Board members are precluded from considering matters where a possible conflict of interest may be present. Further, after their tenure on the board, former members may not become involved with any matter which had been considered by them in their official capacity. 20 C.F.R. § 801.203 (1984). Additionally, in hearings before the Board the parties are entitled to be represented by an attorney, submit written argument, request oral argument and receive a written opinion explaining the Board's decision. 20 C.F.R. §§ 802.202, 802.306 and 802.403 (1984). Thus the Board cannot be described as a tribunal "wholly unsuitable" for the adjudication of substantive legal claims. *Oestereich* v. *Selective Service*

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[7] The Board will not adjudicate claims not raised before the administrative law judge. *Moore* v. *Paycor, Inc.*, 11 B.R.B.S. 483, 492-93 (1979). Nor does the Board consider new evidence or reweigh the evidence presented below. 20 C.F.R. § 802.301 (1984).

System, 393 U.S. 233, 242 (1968) (Harlan, J., concurring). In sum, the Board performs the identical appellate function previously performed by the district courts. Therefore, it appears that Congress intended to vest in the Board the same judicial power to rule on substantive legal questions as was possessed by the district courts. *See Carozza* v. *United States Steel Corp.*, 727 F.2d 74 (3d Cir. 1984).

Other courts, in different legal contexts, have also recognized the Board's power to decide substantive legal claims. Courts have recognized the Board's power to determine whether a claimant for federal benefits was decedent's "wife" under state domestic relations laws, *Ryan-Walsh Stevedoring Co., Inc.* v. *Trainer*, 601 F.2d 1306 (5th Cir. 1979); whether weekly death benefits payable under the Longshoremen's and Harbor Workers' Compensation Act are subject to the limitations imposed by section 6(b)(1) of that Act, *Director, OWCP* v. *O'Keefe*, 545 F.2d 337 (3d Cir. 1976); and whether an administrative law judge may award travel expenses to successful claimants, *Potomac Iron Works* v. *Love*, 673 F.2d 537 (D.C. Cir. 1982) (per curiam). Conversely, the courts of appeals have refused to decide substantive legal questions not presented to the Board in the first instance. *Blevins* v. *Director, OWCP*, 683 F.2d 139, 142-43 (6th Cir. 1982); *General Dynamics Corp.* v. *Sacchetti*, 681 F.2d 37, 40 (1st Cir. 1982). Of course, the courts of appeals retain the plenary authority to review the Board's legal conclusions, *Carozza*, 727 F.2d at 77; *Kalaris*, 697 F.2d at 399; nevertheless, it is apparent that the Board's appellate review provides a screening device for frivolous claims and sharpens the focus of debate if further review is sought in the court of appeals.

Finally, it has been clear since *Crowell* v. *Benson*, 285 U.S. 22 (1932), that Congress can require that the adjudication of congressionally created rights take place in non-Article III tribunals, provided that Article III courts

retain the essential attributes of judicial power. *Carozza*, 727 F.2d at 77; *Kalaris*, 697 F.2d at 388. As articulated by the plurality opinion in *Northern Pipeline Co.* v. *Marathon Pipeline Corp.*, 458 U.S. 50 (1982), "when Congress creates a statutory right, it clearly has the discretion, in defining that right, to . . . provide that persons seeking to vindicate that right must do so before particularized tribunals created to perform the specialized adjudicative tasks related to that right." *Northern Pipeline Co.*, 458 U.S. at 83 (footnote omitted). Here, Gibas' claim against Saginaw involves "the liability of one individual to another under the law as defined," *Northern Pipeline Co.*, 458 U.S. at 69-79 (quoting *Crowell* v. *Benson*, 285 U.S. at 51), and thus concerns the adjudication of "private rights." However, Gibas' right to request benefits was created by Congress. Therefore Congress possessed "substantial discretion to prescribe the manner in which that right may be adjudicated—including the assignment to an [administrative tribunal] of some functions historically performed by judges." *Northern Pipeline Co.*, 458 U.S. at 80 (footnote omitted). In our view, this discretion included the authority to give the Benefits Review Board the power to declare invalid a regulation that is not consistent with the Black Lung Benefits Act.

The holding in *Kalaris* does not undermine our conclusion. There the District of Columbia Circuit ruled that the Board is not an Article III court and that the Secretary could remove Board members at his discretion because Congress did not intend to make the Board independent of the Secretary. *Kalaris*, 697 F.2d at 389, 401. These rulings are not dispositive of the issue presented here. First, the Board's non-Article III status does not affect its authority to adjudicate disputes concerning federally created rights. As noted, Congress has substantial discretion to prescribe the manner in which such rights are initially determined. *Northern Pipeline Co.*, 458 U.S. at 83. Second, Congress' refusal to grant the Board independence from the Secretary is not, in our

view, pertinent to whether the Board exceeded its authority in finding that 20 C.F.R. § 727.203(b)(3) is not in accordance with the Black Lung Benefits Act. The decision in *Kalaris* that the Board is not independent of the Secretary was based upon Congress' silence on the issue and the general rule that "the power of removal presumptively is incident to the power of appointment." *Kalaris*, 697 F.2d at 389. *Kalaris* simply did not concern the scope of the Board's adjudicatory authority under the Act.[8]

Although we find that the Board possessed sufficient adjudicatory authority to declare 20 C.F.R. § 727.203(b)(3) invalid, our inquiry is not over. The Board's construction of section 727.203(b)(3) is subject to plenary review here. *Crowell* v. *Benson*, 285 U.S. at 49-50; *Carozza*, 727 F.2d at 77; *Kalaris*, 697 F.2d at 387. In *Jones* v. *The New River Co.*, *supra*, the Board ruled that the "in whole or in part" language of section 727.203(b)(3) was not consistent with the purposes of 30 U.S.C. § 901(a) and 902(f)(1). This determination was error. The Black Lung Benefits Act requires payment of benefits only for total disability due to pneumoconiosis. 30 U.S.C. § 901 and 902(f)(1), 20 C.F.R. § 727.201 (1984). The Board reasoned that section 727.203(b)(3) permitted the award of benefits for less than total disability. However, section 727.203(b)(3) has nothing to do with the degree of a miner's disability. On the contrary, it concerns the burden placed upon an employer in order to rebut the interim presumption of section 727.203(a). Specifically, section 727.203(b)(3) provides an employer the opportunity to rebut the presumption that a miner is "totally disabled" by "establish[ing] that the *total dis-*

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[8] Nor did the rulings in *American Stevedores, Inc.* v. *Salzano*, 538 F.2d 933, 936 (2d Cir. 1976); *Finnerty* v. *Cohen*, 508 F.2d 979, 982 (2d Cir. 1976) and *Dowen* v. *Warner*, 481 F.2d 642, 643 (9th Cir. 1973), address the issue before us. These cases concerned whether exhaustion of administrative relief was necessary before seeking judicial review of constitutional claims in Article III courts.

ability did not arise in whole or in part out of coal mine employment." 20 C.F.R. § 727.203(b)(3) (emphasis added). As explained by Judge Miller in his dissent in *Van Nest* v. *Consolidation Coal Co.*, 3 Black Lung Rep. at 1-538 (1981),

> [w]hen viewed in proper context, "arises in whole or in part" can only mean *arises in whole* or *arises in part*. It is simply without support to infer, as do my colleagues, that "in part" applies to disability rather than causation. . . . The "in part" language plainly refers to, and modifies, causation (arising out of coal mine employment), not the extent of disability.

Thus, section 727.203(b)(3) does not permit the award of benefits for partial disability; it merely grants an employer the chance to prove that a miner's disability did not arise, in whole or in part, from his coal mine employment. If an employer is able to prove that pneumoconiosis played no part in causing a miner's disability, then the employer has satisfied the requirements of section 727.203(b)(3). Where, however, pneumoconiosis is a contributing cause to a miner's total disability, he is conclusively entitled to benefits. *American Coal Co.* v. *Benefits Review Board*, 738 F.2d 387, 391 (10th Cir. 1984); *Bethlehem Mines Corp.* v. *Massey*, 736 F.2d 120, 123 (4th Cir. 1984); *Alabama By-Products* v. *Killingsworth*, 733 F.2d 1511, 1516 n.10 (5th Cir. 1984); *Carozza*, 727 F.2d at 78. This principle is consistent with the Act's goal of providing benefits to those miners "who are totally disabled due to pneumoconiosis arising out of [coal mine] employment." 30 U.S.C. § 901(a).

The record before us reveals that the administrative law judge considered all of Saginaw's evidence. He expressly acknowledged Gibas' "serious cardio-vascular problems" and Dr. Kress' opinion that Gibas' disability was not caused by pneumoconiosis. Nonetheless, the judge also found persuasive evidence that Gibas has pneu-

moconiosis, is disabled from shortness of breath and has been employed as a coal miner for twenty-four to twenty-nine years under dusty conditions. In light of those facts the judge found that Gibas has satisfied the interim presumption of section 727.203(a), and Saginaw had failed to rebut that presumption. We find no error in these conclusions. Saginaw had the burden of proving that Gibas was not totally disabled. *Bethlehem Mines Corp.*, 736 F.2d at 124; *Alabama By-Products*, 733 F.2d at 1514-15; *Consolidation Coal Co.* v. *Smith*, 699 F.2d 446, 449 (8th Cir. 1983); *Hampton* v. *U.S. Dept. of Labor Benefits Review Board*, 678 F.2d 506, 508 (4th Cir. 1982); *McCluskey* v. *Ziegler Coal Co.*, 2 Black Lung Rep. 1-1248, 1272-73 (1981). The administrative law judge concluded that this burden was not met. A review of the record reveals substantial evidence to support this conclusion. Therefore, the decision of the judge was free of factual or legal error.

The judgment of the Board is reversed; the petition for review is granted, and the case is remanded to the Board with instructions that benefits be awarded.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 83-3408

LEWIS GIBAS,
Petitioner,

v.

SAGINAW MINING COMPANY; DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS; and BENEFITS REVIEW BOARD,
Respondents.

Before: MARTIN and KRUPANSKY, Circuit Judges; and McRAE, Chief District Judge.

[Filed Nov. 26, 1984]

JUDGMENT

ON PETITION TO REVIEW a decision of the Benefits Review Board.

THIS CAUSE came on to be heard on the transcript of record from the said Agency and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the decision of the said Agency in this cause be and the same is hereby reversed; the petition for review is granted, and the case

is remanded to said Board with instruction that benefits be awarded.

It is further ordered that Petitioner recover from Respondents the costs on appeal, as itemized below.

ENTERED BY ORDER
OF THE COURT

JOHN P. HEHMAN
Clerk

/s/ John P. Hehman
Clerk

Issued as Mandate: December 18, 1984

COSTS: (Costs awarded to appellee)

Filing fee	$ None
Printing	$ 95.20
Total	$ 95.20

A True Copy.

Attest:

/s/ Gary McCarthy
Deputy Clerk

BENEFITS REVIEW BOARD
U.S. DEPARTMENT OF LABOR

No. 81-553 BLA

OWCP No. 271-24-4369

LEWIS GIBAS,
Claimant-Petitioner

v.

SAGINAW MINING COMPANY,
Employer-Respondent

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,
Party-in-Interest

[Filed May 19, 1983]

Appeal from the Decision and Order of Charles W. Campbell, Administrative Law Judge, United States Department of Labor.

Daniel L. Manring (Barkan & Neff Co.), Columbus, Ohio, for the claimant.

Gerald P. Duff (Kinder, Kinder & Hanlon), St. Clairsville, Ohio, for the employer.

Cornelius S. Donoghue, Jr. (T. Timothy Ryan, Jr., Solicitor of Labor; Donald S. Shire, Associate Solicitor; J. Michael O'Neill, Assistant Counsel for Black Lung Benefits), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: RAMSEY, Chief Administrative Appeals Judge, MILLER and KALARIS, Administrative Appeals Judges.

DECISION AND ORDER

RAMSEY, Chief Administrative Appeals Judge:

This is an appeal by the employer from a Decision and Order (80-BLA-2292) of Administrative Law Judge Charles W. Campbell awarding benefits pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. § 901 *et seq.* (hereinafter, the Act).[1]

The administrative law judge invoked the interim presumption of entitlement on the basis of claimant's twenty-four years of coal mine employment and the x-ray evidence of record. 20 C.F.R. § 727.203(a)(1). The administrative law judge proceeded to consider the evidence under the standards of Section 727.203(b) and concluded that employer failed to rebut the interim presumption by all available methods.

In its appeal, employer contends that both invocation of the interim presumption upon a finding of simple pneumoconiosis and limitations on rebuttal evidence found in Section 727.203 are unconstitutional. Alternatively, employer contends that, based on the x-ray evidence before him, the administrative law judge erred in invoking the interim presumtion. Lastly, employer argues that the uncontradicted medical opinion evidence rebuts the interim presumption as a matter of law. The claimant maintains that substantial evidence supports the decision below.

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[1] Although the present case was pending on appeal on January 1, 1982, the effective date of the Black Lung Benefits Amendments of 1981, it appears from the record before us that the Amendments do not affect the disposition of this case.

In reviewing the administrative law judge's Decision and Order, the Board's role is narrowly circumscribed. If the administrative law judge's findings of fact are supported by substantial evidence and are not irrational and his rulings are in accordance with law, they are binding upon this Board and may not be disturbed. 33 U.S.C. § 921(b)(3); as incorporated by 30 U.S.C. § 932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates Inc.*, 380 U.S. 359 (1965).

Both of employer's constitutional arguments were addressed by the Board in *Jones v. The New River Co.*, 3 BLR 1-199 (1981), and rejected therein. Therefore, I decline to address them again.

The employer next contends that the administrative law judge erred in invoking the interim presumption based on the x-ray evidence. I disagree. Three chest films are found in the record. The earliest, dated May 18, 1979, was originally read as negative by Dr. R. Stupar, but subsequently re-read as 1/0 p by Dr. J. S. Gordonson, a B-reader. Director's Exhibits Nos. 10 & 11. The other films made in June 1979 and January 1980 were read as negative and 0/1 p respectively by non-B-readers. Director's Exhibit No. 15; Claimant's Exhibit No. 1. The administrative law judge considered all the x-rays, but accorded Dr. Gordonson's reading greater weight because of the expertise and special training of B-readers.

I reject employer's argument that the later evidence rule found in *Call v. Director*, 2 BLR 1-146 (1979), and similar cases compelled the administrative law judge to give greater weight to the negative readings. Although the administrative law judge could have given greater weight to the later negative reading, it was entirely proper for the administrative law judge to accord greater weight to an x-ray interpreted by a B-reader, especially where the earliest film is positive and the time period separating the first and last films is comparatively brief. *Burch v. Old Ben Coal Co.*, 4 BLR 1-229 (1981) (opinion of J. Miller).

Employer's final contention is that the administrative law judge erred in failing to conclude that the medical opinion of Dr. George Kress rebutted the interim presumption pursuant to 20 C.F.R. § 727.203(b)(3).[2]

Dr. Kress examined the claimant in June 1979 and in October 1980 was deposed concerning the results of his examination. On the basis of medical and employment histories, a chest x-ray, an electrocardiograph, and pulmonary function studies, Dr. Kress diagnosed uncontrolled hypertension, old myocardial infarction, and recurrent congestive heart failure all unrelated to the claimant's coal mine employment. In Dr. Kress's opinion, the claimant's shortness of breath is due to his cardiovascular disease. Dr. Kress found no disability which can be attributed to claiman't respiratory system, but opined that claimant is totally disabled due to hypertension and coronary artery insufficiency alone. Director's Exhibit No. 15; Employer's Exhibit No. 3.

In considering the opinion of Dr. Kress and in concluding that the interim presumption was not rebuttted pursuant to Section 727.203(b)(3), the administrative law judge stated,

> In view of the facts that the claimant worked in coal mines about 24 to 29 years under dusty conditions, that his May 1979 x-ray shows simple pneumoconiosis and that he is clearly disabled by conditions including shortness of breath, I believe that it would be unduly speculative to attribute all of his disability to his cardiovascular impairment and none of it to his pneumoconiosis, and I decline to do so. I conclude that the evidence fails to show that the claimant's present disability, during the period since May

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[2] Employer also contends that the presumption was rebutted pursuant to Section 727.203(b)(2) and (b)(4). Based on my holding, *infra*, that the presumption was rebutted pursuant to Section (b)(3) these contentions need not be addressed.

> 1979, does not arise at least in part from his pneumoconiosis. . .

Decision and Order, p. 4.

The administrative law judge incorrectly interpreted Section 727.203(b)(3) as requiring employer to establish that the miner's disability did not arise "at least in part" out of his coal mine employment. In *Jones*, the Board excised the "in whole or in part" language from (b)(3) and held that the presumption is rebutted pursuant to this subsection if it is established that the miner's disability did not arise out of coal mine employment. *Jones, supra. See also Kertesz v. Crescent Hills Coal Co.*, 3 BLR 1-367 (1981). Thus, a showing that the miner's disability is totally due to heart disease has been held sufficient to support subsection (b)(3) rebuttal. *See Starika v. Director*, 4 BLR 1-434 (1982).

Furthermore, the administrative law judge erred in rejecting Dr. Kress's opinion that claimant's disability was totally due to heart disease as "unduly speculative." Dr. Kress's report was based on adequate documentation as defined by the Board in *Gomola v. Manor Mining and Contracting Corp.*, 2 BLR 1-130 (1970), and the documentation supports his conclusions. Moreover, a review of the record reveals that there is no medical opinion contradicting Dr. Kress's conclusion. Inasmuch as Dr. Kress's opinion was improperly rejected and stands uncontradicted, we conclude that the interim presumption is rebutted pursuant to 20 C.F.R. § 727.203(b)(3) as a matter of law.

The Decision and Order awarding benefits below is reversed.

SO ORDERED.

/s/ Robert L. Ramsey
ROBERT L. RAMSEY
Chief Administrative Appeals Judge

KALARIS, Administrative Appeals Judge, concurring:

I concur with my colleague's disposition of the issues in this case. I note that, in rejecting the employer's constitutional challenges to 20 C.F.R. §§ 727.203(a)(1) and (b) and in holding that the administrative law judge erred in applying an improper subsection (b)(3) rebuttal standard, Judge Ramsey relies on the Board's decision in *Jones v. The New River Co.*, 3 BLR 1-199 (1981). The Board's ruling that the interim presumption of Section 727.203(a)(1) and the rebuttal provisions enumerated in Section 727.203(b) are constitutional and its interpretation of subsection (b)(3) rebuttal have been premised on the belief that the Board has the authority to determine the constitutionality and validity of the regulations promulgated by the Secretary of Labor. *McCluskey v. Zeigler Coal Co.*, 2 BLR 1-1248 (1981); *Jones, supra.* The Solicitor of Labor, representing the Director (delegate of the Secretary), has consistently taken the position that the Board lacks any such authority. The recent decision of the United States Court of Appeals for the District of Columbia, *Kalaris v. Donovan*, 697 F.2d 386 (D.C. Cir. 1983), may impact on this question. The court in *Kalaris* held that the Board is *not* independent of the Secretary and that the members of the Board may be removed by the Secretary at will. The Board was characterized, at several points, as "an administrative adjunct" of the Secretary which administers Department of Labor policy, an "internal review mechanism," and "an additional layer of administrative review." The effect of the *Kalaris* holding is that Board members who invalidate a regulation of the Secretary not only fail to administer the Secretary's policy but could also be removed from their positions for having invalidated the regulation.

However, the court in *Kalaris*, while indicating that the Secretary has some control and oversight over the Board, did not decide the extent and nature of that control outside of the power to remove at will. The court did

not directly address the issue of whether the Board lacks the authority to determine the constitutionality and validity of the Secretary's regulations. *Cf. Halon v. Director*, 691 F.2d 180 (3d Cir. 1982), *reh'g granted*, —— F.2d —— (3d Cir. Feb. 28, 1983) (No. 82-3066), wherein the court expressed the view that the Board is under an obligation to effectuate the will of Congress as opposed to the explicit requirements of the Secretary of Labor. Consequently, until the Circuit Courts of Appeals rule directly on the Board's authority to determine the validity and constitutionality of the Secretary's regulations, I will continue to adhere to my position as expresed in *Jones*.

Further, with respect to the employer's argument concerning the applicability of the "latest evidence rule" in the evaluation of the x-ray interpretations, I agree with Judge Ramsey that it was entirely proper for the administrative law judge to accord greater weight to an earlier positive x-ray reading rendered by a "B" reader over later negative x-ray readings. Even though the date of the x-rays is a relevant factor to be considered in the evaluation process, the Board has consistently held that there is no mechanical rule requiring that greater or controlling weight be assigned to the most recent x-ray evidence of record. Additionally, in situations as the instant case where the more recent x-ray evidence is negative and directly conflicts with an earlier positive reading, the administrative law judge *may* accord less weight to the dates of the x-rays in light of the recognized principle that negative x-ray readings are not a trustworthy indicator of the absence of the disease. *See Elkins v. Beth-Elkhorn Corp.*, 2 BLR 1-683 (1979). However, this does not mean that the fact finder can never find the more recent negative x-ray evidence more probative if it is preceded by earlier positive x-ray readings. Moreover, it is my view that the Board should neither explicitly nor implicitly set a time period restricting the application of the "latest evidence rule" in such circum-

stances. (*See Burch v. Old Ben Coal Co.*, 4 BLR 1-229, 232 (1981), wherein Judge Miller stated that a period of approximately sixteen months, ". . . a comparatively brief period of time between the first and last x-rays: . . ." warranted the fact finder's refusal to credit the later negative evidence.)

I accordingly concur with the disposition of the issues in this case.

/s/ Ismene M. Kalaris
ISMENE M. KALARIS
Administrative Appeals Judge

MILLER, Administrative Appeals Judge, concurring in the result:

For the reasons expressed in my dissenting opinions in *Van Nest v. Consolidation Coal Co.*, 3 BLR 1-526, 1-534 (1981) and *Hatcher v. Consolidation Coal Co.*, 5 BLR 1-132, 1-145 (1982), I would affirm the administrative law judge's decision granting benefits to the claimant. However, in the interest of ensuring consistency in the Board's decision, *see* my dissenting opinion in *Clites v. Jones & Laughlin Steel Corp.*, 2 BLR 1-1019, 1-1028-33 (1980), *rev'd*, 3 BLR 2-86, —— F.2d —— (3d Cir. 1981), I concur solely in the result of my colleagues' decision based on the Board's prior decisions in *Jones v. The New River Co.*, 3 BLR 1-199 (1981), and *Kertesz v. Crescent Hills Coal Co.*, 3 BLR 1-367 (1981). *See Carozza v. United States Steel Corp.* —— BLR ——, BRB No. 80-1292 BLA (March 17, 1983).

/s/ Julius Miller
JULIUS MILLER
Administrative Appeals Judge

[SEAL]

U.S. DEPARTMENT OF LABOR
BENEFITS REVIEW BOARD
1111 20th St., N.W.
Washington, D.C. 20036

June 6, 1983

Errata

To all parties of record in:

Gibas v. Saginaw Mining Company (Case No. 80-BLA-2292) (OWCP No. 271-24-4369 (BRB No. 81-553 BLA)

The Board's Decision and Order issued May 19, 1983, contained an error in the caption of the case and an incomplete citation on page 9. Please substitute the enclosed corrected pages.

Sincerely,

BENEFITS REVIEW BOARD

/s/ Agnes Kurtz
AGNES KURTZ
Clerk of the Board

BENEFITS REVIEW BOARD
U.S. DEPARTMENT OF LABOR

No. 81-553 BLA

OWCP No. 271-24-4369

LEWIS GIBAS,
Claimant-Respondent

v.

SAGINAW MINING COMPANY,
Employer-Petitioner

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,
Party-in-Interest

[Filed Jun. 6, 1983]

Appeal from the Decision and Order of Charles W. Campbell, Administrative Law Judge, United States Department of Labor.

Daniel L. Manring (Barkan & Neff Co.), Columbus, Ohio, for the claimant.

Gerald P. Duff (Kinder, Kinder & Hanlon), St. Clairsville, Ohio, for the employer.

Cornelius S. Donoghue, Jr. (T. Timothy Ryan, Jr., Solicitor of Labor; Donald S. Shire, Associate Solicitor; J. Michael O'Neill, Assistant Counsel for Black Lung Benefits), Washington, D.C. for the Director, Office of

Workers' Compensation Programs, United States Department of Labor.

Before: RAMSEY, Chief Administrative Appeals Judge, MILLER and KALARIS, Administrative Appeals Judges.

RAMSEY, Chief Administrative Appeals Judge:

DECISION AND ORDER

This is an appeal by the employer from a Decision and Order (80-BLA-2292) of Administrative Law Judge Charles W. Campbell awarding benefits pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30

* * * *

For the reasons expressed in my disenting opinions in *Van Nest v. Consolidation Coal Co.*, 3 BLR 1-526, 1-534 (1981), *rev'd* Nos. 81-3416 and 81-3463 (6th Cir. August 24, 1982) and *Hatcher v. Consolidation Coal Co.*, 5 BLR 1-132, 1-145 (1982), I would affirm the administrative law judge's decision granting benefits to the claimant. However, in the interest of ensuring consistency in the Board's decision, *see* my dissenting opinion in *Clites v. Jones & Laughlin Steel Corp.*, 2 BLR 1-1019, 1-1028-33 (1980), *rev'd*, 3 BLR 2-86, —— F.2d ——, (3d Cir. 1981), I concur solely in the result of my colleagues' decision based on the Board's prior decisions in *Jones v. The New River Co.*, 3 BLR 1-199 (1981), and *Kertesz v. Crescent Hills Coal Co.*, 3 BLR 1-367 (1981). *See Carozza v. United States Steel Corp.*, —— BLR ——, BRB No. 80-1292 BLA (March 17, 1983).

/s/ Julius Miller
JULIUS MILLER
Administrative Appeals Judge

U.S. DEPARTMENT OF LABOR [SEAL]

OFFICE OF ADMINISTRATIVE LAW JUDGES
304A U.S. Post Office and Courthouse
Cincinnati, Ohio 45202

Case No. 80-BLA-2292

OWCP No. 271-24-4369

In the matter of
LEWIS GIBAS,
Claimant

v.

SAGINAW MINING COMPANY,
Employer

OHIO BUREAU OF WORKERS' COMPENSATION,
Carrier

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party in interest

Date: February 6, 1981

Daniel L. Manring, Esq., For the Claimant

Gerald P. Duff, Esq., For the Employer

Charles W. Campbell, Administrative Law Judge

DECISION AND ORDER—AWARD OF BENEFITS

This proceeding arises from a claim filed by Lewis Gibas, the claimant, for benefits under the Black Lung Benefits Act of 1977, 30 U.S.C. 901 *et seq.* ("Act"). A request for hearing was filed by letter of December 14, 1979, following action by the deputy commissioner. In accordance with the Act and the regulations issued thereunder, this case was referred to the Office of Administrative Law Judges by the Director, Office of Workers' Compensation Programs for a formal hearing.

A formal hearing was held in Wheeling, West Virginia on October 28, 1980, at which the parties were afforded opportunity to present evidence and argument. The regulations issued under the Act are found in title 20 *Code of Federal Regulations.* Regulation section numbers mentioned in this decision and order refer to sections of that title.

The findings of fact and conclusions of law, and the order set forth below are based upon the entire record of the case.[1]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The claimant, Lewis Gibas, was born November 8, 1924 and completed the eight grade (Tr. 8). He has one dependent, his wife, Mildred, to whom he has been married for 28 years (DX 5).

The named employer, Saginaw Mining Company, has stipulated that the claimant has 24 years of coal mine employment (Tr. 7, DX 19). The claimant further testified that he worked for one and one half years prior to World War II in a strip mine (Tr. 9) and from August 1949 to December 1950 as a joy-helper for Werner Colliers, a mine in St. Clairsville, Ohio (Tr. 10). Employ-

[1] The following abbreviations will be used: DX-Director's Exhibit; CX-Claimant's Exhibit; EX-Employer's Exhibit; Tr.-Transcript of hearing.

ment records for the claimant show about 24 years of qualifying coal mine employment, all with Saginaw Mining Company (DX 3). During this employment claimant worked as a timber man, shuttle car operator, wash box operator at the tipple and bit sharpener at the tipple (Tr. 14-19). The claimant's last coal mine employment with Saginaw was June 24, 1978 (DX 3), when he stopped work, apparently due to a heart ailment (DX 1). He has not worked since. Accordingly the employer is the responsible operator within the meaning of the Act and regulations.

The claimant testified that he smoked a half a pack of cigarettes a day for approximately 24 years (Tr. 25).

The claimant reported that he began having breathing problems in 1965 and transferred from underground work to surface work at the tipple. He had a cough which cleared up when he stopped smoking cigarettes in 1969 (CX 1). In 1975 the claimant suffered a heart attack and did not work for one year (Tr. 21). The claimant was hospitalized 12 times from 1975 to 1978 for heart problems (Tr. 29). The claimant stated that he quit his work because his chest bothered him to the point that he was no longer able to do the work (Tr. 22). He stated that he was unable to sleep in his bed without two pillows, and could not walk up a hill or steps because of shortness of breath (Tr. 24). He took various medications for his heart condition, including Predisone, Theolair, Lasix, Inderal, Lanoxin, Dyazide, Butazolidin, Timetapp, Motrin, aspirin and nitroglycerin on occasion (Tr. 26). The claimant also suffers from swelling in his knees and sometimes uses crutches to walk (Tr. 27).

Since the claimant has well over 10 years of coal mine employment, he is presumed to be totally disabled due to pneumoconiosis arising out of that employment if he meets one of the four medical criteria in subparagraphs (a)(1) through (4) of § 727.203. Three X-rays were

taken of the claimant. The first, taken May 18, 1979 was read by Dr. Stupar as negative for pneumoconiosis (DX 11). However, this was reread by Dr. Gordonson, a B reader, as showing 1/0 p opacities in all six lung zones, which is a positive reading for the presence of pneumoconiosis (DX 10). An X-ray taken on June 19, 1979 was read as negative for pneumoconiosis by George O. Kress, M.D. on behalf of the employer (DX 15). An X-ray taken January 2, 1980 was read as negative for pneumoconiosis by Dr. Del Vecchio, (0/1 p) (CX 1). Because of the expertise and special training of B readers, their reports may be given greater weight. I find that Dr. Gordonson's positive reading for pneumoconiosis, considered together with the claimant's length of coal mine employment, raises a rebuttable presumption that he is totally disabled due to pneumoconiosis arising out of that employment.

Three pulmonary function studies performed on the claimant appear in the record. The first, conducted on May 18, 1979 as part of Dr. Pandian's examination, does not show values which meet the requirements of § 727.203(a)(2). The second was performed on June 19, 1979 by Dr. Kress. The values meet the requirements of subsection (a)(2), but Dr. Kress stated the claimant's effort was not maximum, apparently due to the claimant's fear of chest pain. This conclusion of submaximal effort is consistent with the normal results achieved only a month earlier. The final test, included in Dr. Del Vecchio's report, was conducted on January 21, 1980 and showed FEV 1 and MVV readings which meet the requirements of the table in § 727.203 (a)(2) and provide a further basis for invoking the presumption. Dr. Del Vecchio diagnosed, among other things, "mild" pneumoconiosis with the pulmonary function studies showing evidence of small airway disease.

The blood gas studies of record do not meet the table values of § 727.203(b)(3) (CX 1, DX 8), and there is no medical opinion evidence to the effect that the claimant is totally disabled due to pneumoconiosis.

The presumption of disability invoked in favor of the claimant is not rebutted under any of the four grounds set forth in § 727.203(b). Rebuttal is not available under § 727.203(b)(1) because the claimant is not now doing his usual coal mine work or any comparable and gainful work or under § 727.203(b)(4) in view of the X-ray showing of simple pneumoconiosis.

The evidence also fails to show that the claimant is able to do his usual coal mine work or comparable and gainful work or that his disability did not arise at least in part out of his coal mine employment. Dr. Pandian's opinion in May 1979 that the claimant would "fit for the normal work he used to do" was based in part on a negative X-ray reading and in part on the normal May 1979 pulmonary function studies, whereas the more recent January 1980 studies showed definite reduction of pulmonary function. Accordingly, it is concluded that Dr. Pandian's report does not establish either ability to work or that the claimant's disability is not due at least in part to pneumoconiosis.

The employer has argued that the report and deposition of Dr. Kress establishes that the claimant would be able to do his usual work from a pulmonary or respiratory standpoint and that the claimant's disability is not caused by pneumoconiosis, even in part. However Dr. Kress relied in part on a negative X-ray reading, which as stated above, appears to be contrary to the weight of the X-ray evidence. Dr. Kress did state an opinion that the claimant was disabled, but he considered that this was entirely due to cardiovascular disease, which Dr. Kress considered to be the cause of the claimant's progressive shortness of breath.

It is recognized that the claimant has serious cardiovascular problems, that these problems led to his retirement in June 1978 and contribute to his present shortness of breath and that apparently his pneumoconiosis, by

itself, did not prevent him from working in June 1978 or earlier. However it is also true that the claimant has pneumoconiosis, that pneumoconiosis is a progressive and irreversible disease, that it could have continued progress in severity, in the claimant's case, after June 1978 and that Dr. Del Vecchio found evidence of small airway disease in January 1980.

In view of the facts that the claimant worked in coal mines about 24 to 29 years under dusty conditions, that his May 1979 X-ray shows simple pneumoconiosis and that he is clearly disabled by conditions including shortness of breath, I believe that it would be unduly speculative to attribute all of his disability to his cardiovascular impairment and none of it to his pneumoconiosis, and I decline to do so. I conclude that the evidence fails to show that the claimant's present disability, during the period since May 1979, does not arise at least in part from his pneumoconiosis, or that he would now be able to do his previous coal mine work as far as any pulmonary or respiratory impairment is concerned. (No showing has been made as to the availability of comparable and gainful work.)

In view of the foregoing, it is concluded that the employer has not rebutted the interim presumption of totally disabling pneumoconiosis and that the claimant is entitled to benefits.

ATTORNEY FEES

The attorney for the claimant has submitted an application for attorney's fees in this case amounting to $2,225 at the rate of $100 per hour for 22¼ hours. No objections were filed by opposing counsel, and the hours claimed by counsel appear reasonable.

ORDER

The employer, Saginaw Mining Company, is ordered to pay:

1. To the claimant, all benefits to which he is entitled under the Act, augmented by his one dependent described above, commencing May 1, 1979.

2. To the claimant, all medical and hospitalization benefits to which he is entitled for the period commencing May 1, 1979.

3. To the Secretary of Labor, for any payments under the Act he has made to the claimant and to deduct such amounts, as appropriate, from the amounts due under paragraphs 1 and 2, above.

4. To the claimant or to the Secretary of Labor, as appropriate, interest at the rate of six per centum per annum from the date when each payment was due until the date when payment is made.

5. To Daniel L. Manning, Esq., the sum of Two Thousand Two Hundred Twenty-five ($2,225.00) dollars for representation of the claimant during the period April 17, 1980 through December 2, 1980.

/s/ Charles W. Campbell
CHARLES W. CAMPBELL
Administrative Law Judge

FEDERAL COAL MINE HEALTH AND SAFETY ACT OF 1969

TITLE IV

30 USC § 901 et seq.

(As amended by the Black Lung Benefits Act of 1972)

AN ACT To provide for the protection of the health and safety of persons working in the coal mining industry of the United States, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Federal Coal Mine Health and Safety Act of 1969".

* * * *

TITLE IV—BLACK LUNG BENEFITS *

PART A—GENERAL

SEC. 401. Congress finds and declares that there are a significant number of coal miners living today who are totally disabled due to pneumoconiosis arising out of employment in one or more of the Nation's coal mines; that there are a number of survivors of coal miners whose deaths were due to this disease *or who were totally disabled by this disease at the time of their deaths;* and that few States provide benefits for death or disability due to this disease to coal miners or their surviving dependents. It is, therefore, the purpose of this title to provide benefits, in cooperation with the States, to coal miners who are totally disabled due to pneumoconiosis and to the surviving dependent of miners whose death was due to such disease *or who were totally disabled by this disease at the time of their deaths;* and to ensure that in the future adequate benefits are provided to coal miners and their dependents in the event of their death or total disability due to pneumoconiosis.

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* Amendments made by Black Lung Benefits Act of 1972 shown in italic type.

SEC. 402. For purposes of this title—

(a) *The term "dependent" means—*

(1) a child as defined in subsection (g) without regard to subparagraph (2)(B)(ii) thereof; or

(2) a wife who is a member of the same household as the miner, or is receiving regular contributions from the miner for her support, or whose husband is a miner who has been ordered by a court to contribute to her support, or who meets the requirements of section 216(b)(1) or (2) of the Social Security Act. The determination of an individual's status as the "wife" of a miner shall be made in accordance with section 216(h)(1) of the Social Security Act as if such miner were the "insured individual" referred to therein. The term "wife" also includes a "divorced wife" as defined in section 216(d)(1) of the Social Security Act who is receiving at least one-half of her support, as determined in accordance with regulations prescribed by the Secretary, from the miner, or is receiving substantial contributions from the miner (pursuant to a written agreement), or there is in effect a court order for substantial contributions to her support from such miner.

(b) The term "pneumoconiosis" means a chronic dust disease of the lung arising out of employment in a coal mine.

(c) The term "Secretary" where used in part B means the Secretary of Health, Education, and Welfare, and where used in part C means the Secretary of Labor.

(d) The term "miner" means any individual who is or was employed in a coal mine.

(e) The term "widow" includes the wife living with or dependent for support on the miner at the time of his death, or living apart for reasonable cause or because of his desertion, or who meets the requirements of section

216(c), (1), (2), (3), (4), or (5), and section 216(k) of the Social Security Act, who is not married. The determination of an individual's status as the "widow" of a miner shall be made in accordance with section 216(h)(1) of the Social Security Act as if such miner were the "insured individual" referred to therein. Such term also includes a "surviving divorced wife" as defined in section 216(d)(2) of the Social Security Act who for the month preceding the month in which the miner died, was receiving at least one-half of her support, as determined in accordance with regulations prescribed by the Secretary, from the miner, or was receiving substantial contributions from the miner (pursuant to a written agreement) or there was in effect a court order for substantial contributions to her support from the miner at the time of his death.

(f) The term "total disability" has the meaning given it by regulation of the Secretary of Health, Education, and Welfare, except that such regulations shall provide that a miner shall be considered totally disabled when pneumoconiosis prevents him from engaging in gainful employment requiring the skills and abilities comparable to those of any employment in a mine or mines in which he previously engaged with some regularity and over a substantial period of time. Such regulations shall not provide more restrictive criteria than those applicable under section 223(d) of the Social Security Act.

(g) The term "child" means a child or a step-child who is—

(1) unmarried; and

(2)(A) under eighteen years of age, or

(B)(i) under a disability as defined in section 223(d) of the Social Security Act,

(ii) which began before the age specified in section 202(d)(1)(B)(ii) of the Social Security Act, or, in

the case of a student, before he ceased to be a student; or

(C) a student.

The term "student" means a "full-time student" as defined in section 202(d)(7) of the Social Security Act, or a "student" as defined in section 8101(17) of title 5, United States Code. The determination of an individual's status as the "child" of the miner or widow, as the case may be, shall be made in accordance with section 216(h)(2) or (3) of the Social Security Act as if such miner or widow were the "insured individual" referred to therein.

BLACK LUNG BENEFITS REFORM ACT OF 1977
PUBLIC LAW 95-239—MARCH 1, 1978

30 U.S.C. § 902(f)

SHORT TITLE

SECTION 1. *This Act may be cited as the "Black Lung Benefits Reform Act of 1977".*

DEFINITIONS

SEC. 2. *(a) Section 402(b) of the Federal Mine Safety and Health Act of 1977 (hereinafter in this Act referred to as the "Act") is amended to read as follows:*

"(b) The term 'pneumoconiosis' means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment.".

(b) Section 402(d) of the Act is amended to read as follows:

"(d) The term 'miner' means any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal. Such term also includes an individual who works or has worked in coal mine construction or transportation in or around a coal mine, to the extent such individual was exposed to coal dust as a result of such employment.".

(c) Section 402(f) of the Act is amended to read as follows:

"(f)(1) The term 'total disability' has the meaning given it by regulations of the Secretary of Health, Education, and Welfare for claims under part B of this title, and by regulations of the Secretary of Labor for claims under part C of this title, subject to the relevant provisions of subsections (b) and (d) of section 413, except that—

"(A) in the case of a living miner, such regulations shall provide that a miner shall be considered

totally disabled when pneumoconiosis prevents him or her from engaging in gainful employment requiring the skills and abilities comparable to those of any employment in a mine or mines in which he or she previously engaged with some regularity and over a substantial period of time;

"(B) such regulations shall provide that (i) a deceased miner's employment in a mine at the time of death shall not be used as conclusive evidence that the miner was not totally disabled; and (ii) in the case of a living miner, if there are changed circumstances of employment indicative of reduced ability to perform his or her usual coal mine work, such miner's employment in a mine shall not be used as conclusive evidence that the miner is not totally disabled;

"(C) such regulations shall not provide more restrictive criteria than those applicable under section 223(d) of the Social Security Act; and

"(D) the Secretary of Labor, in consultation with the Director of the National Institute for Occupational Safety and Health, shall establish criteria for all appropriate medical tests under this subsection which accurately reflect total disability in coal miners as defined in subparagraph (A).

"(2) Criteria applied by the Secretary of Labor in the case of—

"(A) any claim which is subject to review by the Secretary of Health, Education, and Welfare, or subject to a determination by the Secretary of Labor, under section 435(a);

"(B) any claim which is subject to review by the Secretary of Labor under section 435(b); and

"(C) any claim filed on or before the effective date of regulations promulgated under this subsection by the Secretary of Labor;

shall not be more restrictive than the criteria applicable to a claim filed on June 30, 1973, whether or not the final disposition of any such claim occurs after the date of such promulgation of regulations by the Secretary of Labor.".

Section 411(c) of the Act 30 USC 921(c)(5)

(5) In the case of a miner who dies on or before the date of the enactment of the Black Lung Benefits Reform Act of 1977 who was employed for 25 years or more in one or more coal mines before June 30, 1971, the eligible survivors of such miner shall be entitled to the payment of benefits, at the rate applicable under section 412(a)(2), unless it is established that at the time of his or her death, such miner was not partially or totally disabled due to pneumoconiosis. Eligible survivors shall, upon request by the Secretary, furnish such evidence as available with respect to the health of the miner at the time of his or her death.

20 C.F.R. § 410.412 "Total disability" defined.

(a) A miner shall be considered totally disabled due to pneumoconiosis if:

(1) His pneumoconiosis prevents him from engaging in gainful work in the immediate area of his residence requiring the skills and abilities comparable to those of any work in a mine or mines in which he previously engaged with some regularity and over a substantial period of time (that is, "comparable and gainful work"; see §§ 410.424-410.426); and

(2) His impairment can be expected to result in death, or has lasted or can be expected to last for a continuous period of not less than 12 months.

(b) A miner shall be considered to have been totally disabled due to pneumoconiosis at the time of his death, if at the time of his death:

(1) His pneumoconiosis prevented him from engaging in gainful work in the immediate area of his residence requiring the skills and abilities comparable to those of any work in a mine or mines in which he previously engaged with some regularity and over a substantial period of time (that is, "comparable and gainful work"; see §§ 410.424-410.426; and

(2) His impairment was expected to result in death, or it lasted or was expected to last for a continuous period of not less than 12 months.

20 CFR § 727.203

§ 727.203 Interim presumption.

(a) *Establishing interim presumption.* A miner who engaged in coal mine employment for at least 10 years will be presumed to be totally disabled due to pneumoconiosis, or to have been totally disabled due to pneumoconiosis at the time of death, or death will be presumed to be due to pneumoconiosis, arising out of that employment, if one of the following medical requirements is met:

(1) A chest roentgenogram (X-ray), biopsy, or autopsy establishes the existence of pneumoconiosis (see § 410.428 of this title);

(2) Ventilatory studies establish the presence of a chronic respiratory or pulmonary disease (which meets the requirements for duration in § 410.412(a)(2) of this title) as demonstrated by values which are equal to or less than the values specified in the following table:

	Equal to or less than—	
	FEV_1	MVV
67" or less	2.3	92
68"	2.4	96
69"	2.4	96
70"	2.5	100
71"	2.6	104
72"	2.6	104
73" or more	2.7	106

(3) Blood gas studies which demonstrate the presence of an impairment in the transfer of oxygen from the lung alveoli to the blood as indicated by values which are equal to or less than the values specified in the following table:

Arterial pCO_2	Arterial pO_2 equal to or less than (mm Mg)
30 or below	70
31	69
32	68
33	67
34	66
35	65
36	64
37	63
38	62
39	61
40-45	60
Above 45	Any value

(4) Other medical evidence, including the documented opinion of a physician, exercising reasoned medical judgment, establishes the presence of a totally disabling respiratory or pulmonary impairment;

(5) In the case of a deceased miner where no medical evidence is available, the affidavit of the survivor of such miner or other persons with knowledge of the miner's physical condition, demonstrates the presence of a totally disabling respiratory or pulmonary impairment.

(b) *Rebuttal of interim presumption.* In adjudicating a claim under this subpart, all relevant medical evidence shall be considered. The presumption in paragraph (a) of this section shall be rebutted if:

(1) The evidence establishes that the individual is, in fact, doing his usual coal mine work or comparable and gainful work (see § 410.412(a)(1) of this title); or

(2) In light of all relevant evidence it is established that the individual is able to do his usual coal mine work

or comparable and gainful work (see § 410.412(a)(1) of this title); or

(3) The evidence establishes that the total disability or death of the miner did not arise in whole or in part out of coal mine employment; or

(4) The evidence establishes that the miner does not, or did not, have pneumoconiosis.

(c) *Applicability of Part 718.* Except as is otherwise provided in this section, the provisions of Part 718 of this subchapter as amended from time to time, shall also be applicable to the adjudication of claims under this section.

(d) *Failure of miner to qualify under the presumption in paragraph (a) of this section.* Where eligibility is not established under this section, such eligibility may be established under part 718 of this subchapter as amended from time to time.

20 CFR § 410.426

§ 410.426 Determining total disability: Age, education, and work experience criteria.

(a) Pneumoconiosis which constitutes neither an impairment listed in the appendix to this subpart (see § 410.424), nor the medical equivalent thereof, shall nevertheless be found totally disabling if because of the severity of such impairment, the miner is (or was) not only unable to do his previous coal mine work, but also cannot (or could not), considering his age, his education, and work experience, engage in any other kind of comparable and gainful work (see § 410.412(a)(1)) available to him in the immediate area of his residence. A miner shall be determined to be under a disability only if his pneumoconiosis is (or was) the primary reason for his inability to engage in such comparable and gainful work. Medical impairments other than pneumoconiosis may not be considered.

The following criteria recognize that an impairment in the transfer of oxygen from the lung alveoli to cellular level can exist in an individual even though his chest roentgenogram (X-ray) or ventilatory function tests are normal.

(b) Subject to the limitations in paragraph (a) of this section, pneumoconiosis shall be found disabling if it is established that the miner has (or had) a respiratory impairment because of pneumoconiosis demonstrated on the basis of a ventilatory study in which the maximum voluntary ventilation (MVV) or maximum breathing capacity (MBC), and 1-second forced expiratory volume (FEV), are equal to or less than the values specified in the following table or by a medically equivalent test:

Height (inches)	MVV (MBC) equal to or less than	and	FEV_1 equal to or less than
	L./Min.		L.
57 or less	52		1.4
58	53		1.4
59	54		1.4
60	55		1.5
61	56		1.5
62	57		1.5
63	58		1.5
64	59		1.6
65	60		1.6
66	61		1.6
67	62		1.7
68	63		1.7
69	64		1.8
70	65		1.8
71	66		1.8
72	67		1.9
73 or more	68		1.9

(c) Where the values specified in paragraph (b) of this section are not met, pneumoconiosis may nevertheless be found disabling if a physical performance test establishes a chronic respiratory or pulmonary impairment which is medically the equivalent of the values specified in the table in paragraph (b) of this section. Any decision with respect to such medical equivalence shall be based on medically accepted clinical and laboratory diagnostic techniques including a medical judgment furnished by one or more physicians designated by the Administration.

(d) Where a ventilatory study and/or a physical performance test is medically contraindicated, or cannot be obtained, or where evidence obtained as a result of such tests does not establish that the miner is totally disabled, pneumoconiosis may nevertheless be found totally dis-

abling if other relevant evidence (see § 410.414(c)) establishes that the miner has (or had) a chronic respiratory or pulmonary impairment, the severity of which prevents (or prevented) him not only from doing his previous coal mine work, but also, considering his age, his education, and work experience, prevents (or prevented) him from engaging in comparable and gainful work.

(e) When used in this section, the term "age" refers to chronological age and the extent to which it affects the miner's capacity to engage in comparable and gainful work.

(f) When used in this section, the term "education" is used in the following sense: Education and training are factors in determining the employment capacity of a miner. Lack of formal schooling, however, is not necessarily proof that a miner is an uneducated person. The kinds of responsibilities with which he was charged when working may indicate ability to do more than unskilled work even though his formal education has been limited.

§ 1319 Interim presumption 20 C.F.R. § 410.490

[1] In general

3 BLR: 1-701, 1-764; 2-69

4 BLR: 1-343, 1-507

5 BLR: 1-196, 1-510, 1-529, 1-598

6 BLR: 1-195, 1-393, 1-575, 1-1132

[2] Establishment of

[a] In general, 20 C.F.R. § 410.490(b)

1 BLR: 2-3, 2-71

2 BLR: 1-167

4 BLR: 1-270

5 BLR: 1-427; 2-20, 2-30, 2-115

6 BLR: 1-288, 1-597, 1-1104

[3] Rebuttal of

6 BLR: 1-560

§ 1320 Interim presumption 20 C.F.R. § 727.203

[1] In general

3 BLR: 1-332, 1-466, 1-565, 1-610; 3-30

4 BLR: 1-180, 1-190, 1-229, 1-263, 1-270, 1-285, 1-343, 1-370, 1-398, 1-428, 1-462, 1-467, 1-507, 1-571, 1-586, 1-627, 1-631, 1-635; 3-19, 3-103

5 BLR: 1-56, 1-106, 1-248, 1-357, 1-368, 1-454, 1-499, 1-758

6 BLR: 1-129, 1-723, 1-1042, 1-1143; 2-119

[2] Establishment of

[a] In general, 20 C.F.R. § 727.203(a)

2 BLR: 1-911, 1-946, 1-998, 1-1080

3 BLR: 1-119, 1-169, 1-185, 1-367, 1-422, 1-426, 1-487, 1-557, 1-692, 1-696, 1-710, 1-773; 3-1, 3-57, 3-89, 3-102, 3-158, 3-165

4 BLR: 1-29, 1-123, 1-186, 1-190, 1-221, 1-225, 1-229, 1-237, 1-252, 1-270, 1-285, 1-292, 1-355, 1-370, 1-446, 1-485, 1-489, 1-497, 1-548, 1-591, 1-620, 1-689

5 BLR: 1-75, 1-260, 1-357, 1-419, 1-510, 1-533, 1-650, 1-755, 1-816, 1-881; 2-20, 2-51, 2-84; 3-95

6 BLR: 1-134, 1-221, 1-224, 1-272, 1-575, 1-597, 1-791, 1-834, 1-839, 1-849, 1-875, 1-888, 1-910, 1-933, 1-945, 1-1008, 1-1013, 1-1100, 1-1176, 1-1219

[b] § 727.203(a)(1)

2 BLR: 1-683, 1-886, 1-1178

3 BLR: 1-52, 1-153, 1-163, 1-332, 1-376, 1-466, 1-547, 1-636; 3-41, 3-67, 3-139, 3-171, 3-181, 3-195

4 BLR: 1-7, 1-16, 1-35, 1-123, 1-144, 1-168, 1-221, 1-229, 1-246, 1-261, 1-308, 1-320, 1-329, 1-343, 1-355, 1-370, 1-446, 1-507, 1-527, 1-620, 1-717; 3-109

5 BLR: 1-1, 1-16, 1-49, 1-117, 1-165, 1-289, 1-301, 1-419, 1-525, 1-701, 1-793, 1-896; 3-71, 3-82, 3-95

6 BLR: 1-49, 1-256, 1-307, 1-365, 1-368, 1-376, 1-450, 1-454, 1-521, 1-535, 1-582, 1-636, 1-666, 1-773, 1-784, 1-902, 1-905, 1-930,

1-1083, 1-1130, 1-1151, 1-1185, 1-1189, 1-1276, 1-1291

[c] § 727.203(a)(2)

2 BLR: 1-1217

3 BLR: 1-136, 1-158, 1-163, 1-185, 1-477, 1-487, 1-547, 1-557, 1-575, 1-636, 1-701, 1-710; 3-1, 3-67, 3-139, 3-171, 3-195

4 BLR: 1-164, 1-221, 1-246, 1-261, 1-292, 1-370, 1-446, 1-489, 1-631, 1-667, 1-701, 1-761

5 BLR: 1-49, 1-346, 1-408, 1-586, 1-616

6 BLR: 1-1, 1-87, 1-149, 1-307, 1-314, 1-454, 1-648, 1-767, 1-799, 1-815, 1-820, 1-826, 1-988, 1-1060, 1-1067, 1-1083, 1-1086, 1-1120, 1-1141, 1-1189, 1-1249

[d] § 727.203(a)(3)

3 BLR: 3-79, 3-171, 3-181

4 BLR: 1-229, 1-252, 1-334

5 BLR: 1-320, 1-325, 1-339, 1-408, 1-544, 1-849; 2-130

6 BLR: 1-1, 1-87, 1-149, 1-454, 1-743, 1-767, 1-773, 1-788, 1-797, 1-799, 1-820, 1-1013, 1-1189, 1-1259; 2-102

[e] § 727.203(a)(4)

2 BLR: 1-886

3 BLR: 1-63, 1-153, 1-163, 1-193, 1-380, 1-414, 1-477, 1-487, 1-547, 1-636, 1-692; 3-1, 3-117, 3-139, 3-171, 3-175

4 BLR: 1-35, 1-292, 1-350, 1-446, 1-551, 1-564, 1-601, 1-627; 2-142; 3-32, 3-41

5 BLR: 1-117, 1-275, 1-289, 1-520, 1-533, 1-570, 1-574, 1-613, 1-667, 1-691, 1-844; 2-138; 3-40, 3-71, 3-95

6 BLR: 1-1, 1-84, 1-272, 1-285, 1-307, 1-365, 1-368, 1-423, 1-476, 1-535, 1-564, 1-567, 1-597, 1-601, 1-619, 1-767, 1-773, 1-797, 1-799, 1-826, 1-865, 1-877, 1-888, 1-1086, 1-1127, 1-1130, 1-1138, 1-1164, 1-1185, 1-1189, 1-1214, 1-1219, 11-1222; 2-11, 2-23, 2-73

[f] § 727.203(a)(5)

3 BLR: 1-380, 1-692

4 BLR: 1-571

5 BLR: 1-510, 1-873

6 BLR: 1-757, 1-873, 1-920, 1-993, 1-1203

[3] Rebuttal of

[a] In general, 20 C.F.R. § 727.203(b)

2 BLR: 1-1080, 1-1081, 1-1089

3 BLR: 1-185, 1-332, 1-343, 1-450, 1-547, 1-557, 1-589, 1-668, 1-692, 1-701, 1-710, 1-773; 3-1, 3-41, 3-57, 3-67, 3-150, 3-158, 3-165, 3-175

4 BLR: 1-16, 1-95, 1-159, 1-168, 1-190, 1-221, 1-229, 1-252, 1-308, 1-313, 1-329, 1-377, 1-446, 1-497, 1-551, 1-564, 1-601, 1-627, 1-631, 1-701; 2-82; 3-51, 3-57

5 BLR: 1-75, 1-132, 1-165, 1-196, 1-282, 1-352, 1-474, 1-544, 1-570, 1-590, 1-758; 3-82

6 BLR: 1-33, 1-60, 1-96, 1-110, 1-117, 1-159, 1-408, 1-511, 1-521, 1-571, 1-597, 1-627, 1-631, 1-636, 1-757, 1-760, 1-843, 1-930, 1-988, 1-996, 1-1055, 1-1143, 1-1206; 2-23, 2-42, 259, 2-73, 2-92

[b] § 727.203(b)(1)

3 BLR: 3-8, 3-34, 3-181

4 BLR: 1-159, 1-320, 1-350, 1-717

5 BLR: 1-1, 1-96, 1-896; 2-24

6 BLR: 1-73, 1-606, 1-771, 1-924, 1-996, 1-1088

[c] § 727.203(b)(2)

2 BLR: 1-1081, 1-1089, 1-1217

3 BLR: 1-52, 1-158, 1-185, 1-220, 1-343, 1-367, 1-395, 1-434, 1-450, 1-526, 1-701, 1-764, 1-773, 1-806, 1-822; 3-8, 3-14, 3-21, 3-89, 3-108, 3-128, 3-139

4 BLR: 1-1, 1-35, 1-144, 1-164, 1-190, 1-216, 1-229, 1-270, 1-285, 1-298, 1-308, 1-320, 1-343, 1-365, 1-377, 1-387, 1-411, 1-462, 1-497, 1-511, 1-522, 1-527, 1-534, 1-586, 1-635, 1-646, 1-728, 1-733; 2-119; 3-75

5 BLR: 1-1, 1-56, 1-132, 1-196, 1-227, 1-248, 1-330, 1-378, 1-384, 1-395, 1-400, 1-404, 1-445, 1-457, 1-604, 1-650, 1-718, 1-730, 1-746, 1-816, 1-878, 1-884; 2-24; 3-159

6 BLR: 1-18, 1-67, 1-117, 1-122, 1-227, 1-240, 1-314, 1-361, 1-378, 1-416, 1-430, 1-487, 1-493, 1-521, 1-556, 1-560, 1-622, 1-627, 1-636, 1-643, 1-677, 1-683, 1-693, 1-698, 1-702, 1-706, 7-710, 1-712, 1-734, 1-743, 1-760, 1-780, 1-802, 1-824, 1-829, 1-851, 1-892, 1-924, 1-940, 1-991, 1-996, 1-1000, 1-1039, 1-1048, 1-1055, 1-1064, 1-1088, 1-1094, 1-1107, 1-1146, 1-1157, 1-1197, 1-1209, 1-1217, 1-1234, 1-1249, 1-1259; 2-42, 2-59, 2-68, 2-102

[d] § 727.203(b)(3)

2 BLR: 1-972

3 BLR: 1-63, 1-199, 1-220, 1-343, 1-350, 1-367, 1-410, 1-526, 1-547, 1-622.8, 1-701, 1-822; 3-26, 3-139

4 BLR: 1-1, 1-7, 1-144, 1-175, 1-229, 1-298, 1-320, 1-329, 1-434, 1-489, 1-497, 1-522, 1-571, 1-586, 1-608, 1-635, 1-646, 1-728; 3-32, 3-62

5 BLR: 1-1, 1-37, 1-49, 1-56, 1-65, 1-248, 1-301, 1-419, 1-429, 1-474, 1-604, 1-642, 1-793, 1-816; 3-29

6 BLR: 1-1, 1-23, 1-96, 1-122, 1-314, 1-430, 1-521, 1-556, 1-567, 1-663, 1-666, 1-712, 1-716, 1-720, 1-734, 1-743, 1-788, 1-829, 1-868, 1-940, 1-996, 1-1146, 1-1249, 1-1255, 1-1284, 1-1298, 1-1306, 1-1318; 2-48, 2-59, 2-81

[e] § 727.203(b)(4)

2 BLR: 1-972

3 BLR: 1-158, 1-343, 1-547, 1-575, 1-636, 1-710; 3-26, 3-79, 3-108

4 BLR: 1-7, 1-62, 1-308, 1-320, 1-370, 1-489, 1-552; 3-41

5 BLR: 1-317, 1-429, 1-517

6 BLR: 1-96, 1-314, 1-400, 1-408, 1-521, 1-567, 1-571, 1-579, 1-612, 1-666, 1-743, 1-996, 1-1039, 1-1138, 1-1169, 1-1306; 2-48

[f] § 727.204(d)

4 BLR: 2-137

5 BLR: 1-66; 2-1

[4] Failure to qualify under interim presumption, 20 C.F.R. § 727.203(d)

3 BLR: 1-52, 1-163, 1-350, 1-477, 1-610, 1-627, 1-636, 1-773; 3-187

4 BLR: 1-29, 1-467, 1-564; 3-32, 3-41, 3-62, 3-105

5 BLR: 1-106, 1-165, 1-309, 1-357; 3-116

6 BLR: 1-10

§ 1321 Irebuttable presumption

[1] 30 U.S.C. § 921(c)(3) complicated pneumoconiosis

3 BLR: 2-36

§ 1322 Rebuttal of

[1] 30 U.S.C. § 921(c)(1) causal relationship

1 BLR: 1-297, 1-840

[2] 30 U.S.C. § 921(c)(2) presumption of death due to pneumoconiosis

1 BLR: 1-80

2 BLR: 1-378, 1-1143

[3] 30 U.S.C. § 921(c)(3) complicated pneumoconiosis

1 BLR: 1-671

2 BLR: 1-13

[4] 30 U.S.C. § 921(c)(4) respiratory or pulmunary impairment

1 BLR: 1-87, 1-237, 1-276, 1-298, 1-473, 1-537, 1-754, 1-776, 1-840, 1-898, 1-966

2 BLR: 1-13, 1-82, 1-92, 1-286, 1-378, 1-662, 1-1143, 1-1219

3 BLR: 1-487, 1-526, 1-575, 1-622.8; 2-36

4 BLR: 1-95, 1-313, 1-434

79-386 BLA

OWCP No. 236-22-6652

PHILLIP H. JONES,
Claimant-Respondent

v.

THE NEW RIVER COMPANY,
Employer-Petitioner

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,
Party-in-Interest

DECISION and ORDER

Syllabus

The Board ruled that the interim presumption of § 727.203(a)(1) was constitutional because evidence submitted to Congress established a rational relationship between the requirements of proving pneumoconiosis by x-ray evidence and ten years of coal mine employment and the presumption of total disability due to pneumoconiosis arising out of coal mine employment. Furthermore, since "Congress has the authority to pass legislation compensating miners for merely contracting pneumoconiosis, be it simple or complicated [i]t therefore makes no sense to invalidate a *rebuttable* presumption such as 20 C.F.R. § 727.203(a)(1), when Congress clearly could lawfully legislate a more far-reaching result than this presumption contemplates." Finally, the administrative problems associated with handling the large

volume of black lung claims are aided by this interim evidentiary rule, providing "another consideration which compels the conclusion that Congress did not act arbitrarily but mandated a rational, constitutional scheme for prompt processing of claims."

Where the record did not show that the employer was hampered in the presentation of its case, the employer lacked standing to argue that it was unconstitutionally deprived of due process because § 727.203 (b) limits the type of evidence it may submit to rebut the interim presumption.

The Board ruled that § 727.203(b)(3) was "not in keeping with the Act," and places an almost impossible burden of proof upon the employer insofar as it allows the interim presumption to remain intact if any *part* of the claimant's disability arose out of coal employment. Consequently, § 727.203(b)(3) should now be read "as though the words 'in whole or in part' were not part [of the regulation], *i.e.* the presumption is rebutted under § 727.203(b)(3) if total disability or death did not arise out of coal mine employment."

The administrative law judge did not err in awarding benefits to commence with the onset of the disability in September 1974, despite the enactment of the Reform Act on March 1, 1978, since the Act provides that previously denied or pending claims are to be reviewed under the Reform Act criteria and that benefits may be awarded as far back as January 1, 1974.

The claimant's adult stepdaughter was properly found to be his dependent for the purposes of augmented benefits where she was considered his disabled child for Social Security purposes, had a low I.Q., was diagnosed mentally retarded, and was unable to successfully complete a vocational rehabilitation program.

Appeal from the Decision and Order and Supplemental Order of Joseph P. Gonzalez, Administrative Law Judge, United States Department of Labor.

William F. Richmond, Jr. (Bowers, Hodson, Henderson & Richmond), Beckley, West Virginia, for the employer.

Elaine Blass (T. Timothy Ryan, Jr., Solicitor of Labor; Laurie M. Streeter, Associate Solicitor; Judith E. Wolf, Co-Counsel for Black Lung Benefits), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, Chief Administrative Appeals Judge, MILLER and KALARIS, Administrative Appeals Judges.

KALARIS, Administrative Appeals Judge:

This is an appeal by the New River Company (hereinafter, the employer) from a Decision and Order and Supplemental Order (78-BLA-145) of Administrative Law Judge Joseph P. Gonzalez awarding benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. § 901 *et seq.* (hereinafter, the Act).

In this case, the Board is called upon to decide the constitutionality of 20 C.F.R. § 727.203(a)(1), a regulation implementing the Black Lung Benefits Reform Act of 1977 (hereinafter, the Reform Act). This regulation provides a presumption of total disability due to pneumoconiosis arising out of coal mine employment if the miner has 10 years of coal mine employment and chest x-ray, autopsy or biopsy establishes the existence of pneumoconiosis. 20 C.F.R. § 727.203(a)(1).

Following an evidentiary hearing in Beckley, West Virginia on January 5, 1979, the administrative law judge found that the claimant had in excess of 10 years of coal mine employment, and that the claimant had simple pneumoconiosis on the basis of the x-ray evidence.

He further found that the claimant was entitled to the interim presumption of total disability due to pneumoconiosis under 20 C.F.R. § 727.203(a)(1), and that the interim presumption had not been rebutted. Claimant was awarded black lung benefits for himself, his spouse and their dependent children, including his 37-year-old stepdaughter, Evelyn.

Employer raises several issues:

1) Section 727.203(a), 20 C.F.R. § 727.203(a), is unconstitutional because it establishes a presumption based upon improper medical criteria.

2) The limitation on rebuttal evidence under 20 C.F.R. § 727.203(b) is unconstitutional as a denial of due process.

3) The administrative law judge erred in invoking the interim presumption and in finding that it was not rebutted.

4) The administrative law judge erred in determining that payments were to commence as of September 1974 since benefits may not be awarded under the Reform Act for periods prior to the date of its enactment, *i.e.*, March 1, 1978.

5) The administrative law judge erred in finding that the claimant's 37-year-old stepdaughter was disabled and dependent upon him.

The Director contends that the Decision and Order is supported by substantial evidence, is in accordance with law and should be affirmed. The claimant filed no response to employer's petition for review.

In reviewing the administrative law judge's Decision and Order, the Board's role is narrowly circumscribed. If his findings of fact are supported by substantial evidence, are not irrational, and his rulings consistent with applicable law, the decision must be affirmed. 33 U.S.C.

§ 921(b)(3) as incorporated by 30 U.S.C. § 932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates Inc.*, 380 U.S. 359 (1965).

I

We turn first to the employer's challenge to the constitutionality of the interim presumption found at Section 727.203(a) of the regulations.[1] 20 C.F.R. § 727.203 (a). The administrative law judge in the instant case found the Section 727.203(a)(1) presumption invoked based on the x-ray evidence of record. He did not consider any other method of invocation. Accordingly, the employer lacks standing to challenge any method of invocation other than x-ray, *McCluskey v. Ziegler Coal Co.*, 2 BLR 1-1248 (1981), and we will address the constitutionality of Section 727.203(a)(1) x-ray invocation only.

The employer concedes that the x-ray evidence of record establishes the existence of simple pneumoconiosis. Emp. Brief, p. 3. However, it contends that x-rays are not a medical tool designed to demonstrate disability; that there is not a rational relationship between an x-ray showing of simple pneumoconiosis and disability, and that therefore the presumption is unconstitutional.

From a careful perusal of Section 727.203(a)(1), the enabling statute and its legislative history, it must be concluded that Subsection (a)(1) of Section 727.203 is designed to achieve an end consistent with the purposes of the Reform Act, is rational, does not contravene the employer's due process rights under the Fifth Amendment to the United States Constitution, and is therefore

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[1] We have recently held that this Board has the authority to decide the constitutionality and validity of regulations promulgated pursuant to the Act, *McCluskey v. Ziegler Coal Co.*, 2 BLR 1-1248 (1981), thus answering the Director's contention in the instant case that the Board is not the proper forum for the resolution of constitutional issues.

legally valid. My colleague, Judge Miller, concurs in this judgment.

The Secretary's regulations "will be sustained [as valid] as long as [they are] 'reasonably related to the purpose of the enabling legislation' . . . ." *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 369 (1973), quoting *Thorpe v. Housing Authority*, 393 U.S. 268, 280-81 (1969). Congress adopted the Federal Coal Mine Health and Safety Act of 1969, as amended, "to provide benefits . . . to coal miners who are totally disabled due to pneumoconiosis and to the surviving dependents of miners whose death was due to such disease or who were totally disabled by this disease at the time of their death." 30 U.S.C. § 901(a). To this end, the Secretary of Labor is authorized to promulgate "such regulations as [he] deems appropriate to carry out the provisions of [Title IV, Part C, of the Federal Coal Mine Health and Safety Act of 1969, as amended]." 30 U.S.C. § 936(a) Congress mandated that any claim which was pending or denied on the effective date of the Reform Act, March 1, 1978, or any claim filed on or before the effective date of permanent regulations promulgated by the Secretary, March 31, 1980, was to be adjudicated pursuant to criteria not more restrictive than the criteria applicable to a claim filed on June 30, 1973.[2]

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[2] Congress was dissatisfied with the results obtained under the Federal Coal Mine Health and Safety Act of 1969 as originally enacted. *See* S. Rep. No. 92-743, 92d Cong., 2d Sess. (1972), *1972 U.S. Code Cong. and Admin. News*, p. 2307 *et seq.* It was felt that many miners and their survivors for whose benefit the Act had been passed were failing to qualify for benefits under applicable standards. In response, Congress amended the Act in 1972. At the same time, Congress indicated its expectation that the Secretary of Health, Education and Welfare would adopt by regulation "such interim evidentiary rules and disability evaluation criteria as will permit prompt and vigorous processing of the large backlog of claims consistent with the language and intent of these amendments." S. Rep. No. 92-743, 92d Cong., 2d Sess. (1972), *1972 U.S. Code Cong. and Admin. News* at 2322. In response to this directive,

30 U.S.C. § 902(f)(2). The criteria applicable on June 30, 1973, are found at 20 C.F.R. § 410.490. As pertinent here, Section 727.203(a)(1) provides that a presumption of total disability due to pneumoconiosis is available to miners who engage in coal mine employment for at least 10 years and who establish the existence of pneumoconiosis on the basis of a chest x-ray, biopsy or autopsy. This provision is substantially similar to its counterpart at 20 C.F.R. § 410.490.[3] It is then apparent that, as far as this method of invocation is concerned, the medical evidence (x-ray, biopsy, or autopsy evidence of pneumoconiosis) necessary under 20 C.F.R. §§ 410.490(b)(1)(i) and 727.203(a)(1) for invoking the presumption of total disability due to pneumoconiosis is identical. It must be concluded, therefore, that, as applied to the facts of this case, Section 727.203(a)(1) is not more restrictive than the criteria applicable to a claim filed on June 30, 1973, and that Subsection (a)(1) of Section 727.203 is consistent with the purpose of the Reform Act.

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the Secretary of HEW promulgated regulations entitled "Interim adjudicatory rules for certain Part B claims filed by a miner before July 1, 1973, or by a survivor where the miner died before January 1, 1974." 20 C.F.R. § 410.490. These rules established standards for determining total disability due to pneumoconiosis that were more lenient than the criteria applicable to claims filed by miners on or after July 1, 1973.

[3] Section 410.490(b) provides, in pertinent part:

> With respect to a miner who files a claim for benefits before July 1, 1973, and with respect to a survivor of a miner who dies before January 1, 1974, when such survivor timely files a claim for benefits, such miner will be presumed to be totally disabled due to pneumoconiosis, or to have been totally disabled due to pneumoconiosis at the time of his death, or his death will be presumed to be due to pneumoconiosis, as the case may be, if:
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> (1) One of the following medical requirements is met:
>
> (i) A chest roentgenogram (x-ray), biopsy, or autopsy establishes the existence of pneumoconiosis . . .

20 C.F.R. § 410.490(b).

The employer, however, specifically disputes the rationality of this regulation. It contends that Section 727.203 (a)(1) establishes a presumption not based upon a proper medical criterion and that there is no rational relationship, medical or otherwise, between an x-ray showing of simple pneumoconiosis and total disability. If this contention were true, the presumption would have to be adjudged unconstitutional under the Supreme Court's standard for testing such presumptions:[4]

> That a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law or a denial of the equal protection of the law it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be purely arbitrary mandate.

Mobile, J. & K.C.R. Co. v. Turnipseed, 219 U.S. 35, 43 (1910), quoted with approval in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 28 (1976).

Upon examination of the legislative history of the Act, however, it is apparent that Congress had sufficient documentation and testimony before it to mandate the continuation of the Section 410.490 rebuttable presumption of total disability due to pneumoconiosis upon a showing of 10 years of coal mine employment plus x-ray evidence of pneumoconiosis. No absolute correlation between years of coal mine employment and total disability was established. *See* S. Rep. No. 1254, 94th Cong. 2d Sess 7 1976), *reprinted in* the *Legislative History of the Black Lung Benefits Reform Act and Black Lung Benefits Revenue Act of 1977* at 342 (1979) (hereinafter, *Legislative*

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[4] A regulatory presumption is judged by the same standard applicable to statutory presumptions. *Atwood's Transport Lines, Inc. v. U.S.*, 211 F. Supp. 168 (D.D.C. 1962), *aff'd* 373 U.S. 377 (1963).

History of the Reform Act). Evidence before Congress did show a strong correlation between years spent in coal mining and the incidence of pneumoconiosis. *See* H.R. Rep. No. 151, 95th Cong. 1st Sess. 28, 29 (1977), *reprinted in* the *Legislative History of the Reform Act* at 537, 538 (1979).

Most of the evidence showed a sharp increase in the prevalence of pneumoconiosis after 15 years in the mines, and there was evidence that some respiratory disease "is likely to begin after as little as one year . . . symptoms get progressively worse with more years spent underground." H.R. Rep. No. 770, 94th Cong., 1st Sess. 71 (1975), *reprinted in* the *Legislative History of the Reform Act* at 183 (1979). One study, based on x-ray evidence, found a progresive increase in the prevalence of pneumoconiosis after 11 years of mining. Id. at 71, *reprinted in* the *Legislative History of the Reform Act* at 183. Based on all the evidence before it, the House reported that 10 years of coal mine employment was the point at which the probability of developing pneumoconiosis began to increase. *Id.* at 71, *reprinted in* the *Legislative History of the Reform Act* at 183. Thus, Congress reasonably found that miners with 10 or more years of coal mine employment very likely will have developed pneumoconiosis.

Further, conclusive evidence before Congress established that x-rays, although not diagnostic of disability, are diagnostic of the existence of pneumoconiosis. Indeed, Congress reached this conclusion, H.R. Rep. No. 460, 92nd Cong., 1st Sess. 9 (1971), and employer concedes this fact. Emp. Brief, p. 3.

Excerpts from the legislative history disclose that Congress determined that a miner who contracted simple pneumoconiosis was sometimes totally disabled due to that disease. The House Report accompanying the 1977 Amendments states:

> Coal workers' pneumoconiosis is caused by the inhalation of coal mine dust. Total disability may arise due to either simple or complicated pneumoconiosis . . .
>
> * * * *
>
> *Simple pneumoconiosis may also be totally disabling,* though the law does not contain a conclusive presumption that a miner is totally disabled if he is so afflicted. Rather, the present test is administratively determined except that a miner is to be deemed totally disabled 'when pneumoconiosis prevents him from engaging in gainful employment requiring the skills and abilities comparable to those of any employment in a mine or mines in which he previously engaged with some regularity and over a substantial period of time.'

H. Rep. No. 95-151, 95th Cong., 1st Sess. 3 (1977), *reprinted in U.S. Code Cong. and Admin. News* 1977, p. 239. (Emphasis added.)

Evidence supporting this determination included statements by Dr. Donald Rasmussen and Dr. Lorin Kerr in an article in the *Congressional Record* of November 19, 1971. Dr. Rasmussen stated that he found that many men in West Virginia with "simple, nodular pneumoconiosis . . . were significantly disabled." Dr. Kerr stated that initial x-ray signs are infallible precursors of later disability, although significant ventilatory changes seldom occur before grade 3 simple pneumoconiosis. 117 CONG. REC. 40430 (1971), *reprinted in* Subcommittee on Labor and Public Welfare, 94th Cong., 1st Sess., *Legislative History of the Federal Coal Mine Health and Safety Act of 1969,* at 1805 (1975).

The Surgeon General also testified that "it is generally accepted by physicians that simple pneumoconiosis seldom produces significant ventilation impairment, but *the pinpoint type may reduce the diffusing capacity, the ability to transfer oxygen from the lung into the blood.*"

S. Rep. No. 1254, 94th Cong., 2d Sess. 4 (1976), reprinted in the *Legislative History of the Reform Act* at 34 (1979). (Emphasis added.)

Despite the fact that there was conflicting evidence on the relationship of simple pneumoconiosis to total disability,[5] Congress's conclusion that there is a relationship between simple pneumoconiosis and total disability is supported by the evidence submitted to Congress.

Positive x-ray evidence is diagnostic of simple pneumoconiosis, and such x-rays are likely to accurately reflect the miner's condition after 10 years of coal mine employment. Congress also had evidence before it of a link between simple pneumoconiosis and total disability. We therefore cannot say that there is no rational relationship between the facts proved (x-ray evidence or pneumoconiosis and 10 years of coal mine employment) and the facts presumed (total disability due to pneumoconiosis arising out of coal mine employment). We accordingly find the presumption neither irrational nor "purely arbitrary." *Usery, supra,* at 28.

There is another reason for upholding the presumption. The Supreme Court in *Usery* addressed the constitutionality of Section 411(c)(3) of the Act, 30 U.S.C. § 921(c)(3), which provides an irrebuttable presumption of entitlement to miners with x-ray evidence of complicated pneumoconiosis. The Court refused to strike the Section 411(c)(3) presumption, stating that ". . . in a statute such as this, regulating purely economic matters, we do not think that Congress' choice of statutory

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[5] There was some evidence that disability was not clearly related to simple pneumoconiosis. *See, e.g.,* Black Lung Amendments of 1973: Hearings before the General Subcommittee on Labor of the House Committee on Education and Labor, 93d Cong., 1st and 2d Sess. 199 (1974); Black Lung Benefits Reform Act, 1976: Hearings on H.R. 10760 and S. 3183 before the Subcommittee of Labor of the Senate Committee on Labor and Public Welfare, 94th Cong., 2d Sess. 682 (1976).

language can invalidate the enactment when its operation and effect are clearly permissible." *Usery*, *supra*, at 23-24. (Citations omitted.) The Court concluded "We cannot say that it would be irrational for Congress to conclude that impairment of health alone warrants compensation." *Usery*, *supra*, at 23.

The considerations which swayed the Supreme Court in *Usery* are equally applicable here. There is no doubt that Congress has the authority to pass legislation compensating miners for merely contracting pneumoconiosis, be it simple or complicated. It therefore makes no sense to invalidate a *rebuttable* presumption, such as 20 C.F.R. § 727.203(a)(1), when Congress clearly could lawfully legislate a more far-reaching result than this presumption contemplates, *i.e.*, compensating miners for merely contracting pneumoconiosis rather than being totally disabled by it.

There is yet another reason for upholding the Section 727.203(a)(1) presumption. Congress, in 1972, was concerned about the huge backlog of claims filed under the 1969 Act awaiting adjudication. Congress desired interim evidentiary rules designed to facilitate "prompt and vigorous processing" of these claims. Oversight of the Administration of the Black Lung Program, 1977: Hearings before the Subcommittee on Labor of the Senate Committee on Human Resources, 95th Cong., 1st Sess. 194 (1977). The Social Security interim criteria, 20 C.F.R. § 410.490, were designed to take care of this problem. *Id.* at 194. The same problems and considerations led Congress to require similar standards under the Reform Act of 1977.

Although the concern for administrative efficiency may not be reason in and of itself to declare an exercise of legislative power constitutional, it is a valid consideration in the instant case. The peculiar administrative problems inherent in the adjudication of vast numbers

of black lung claims certainly warrant special procedures. This is yet another consideration which compels the conclusion that Congress did not act arbitrarily, but mandated a rational, constitutional scheme for prompt processing of claims.

The employer next contends that it is unconstitutionally deprived of due process of law because Section 727.203(b) limits the type of evidence it may submit to rebut the interim presumption.

Section 727.203(b) provides that, in adjudicating all claims under Subpart C of Part 727, "all relevant medical evidence shall be considered." 20 C.F.R. § 727.203(b). Four methods of rebuttal are set forth, but there are no restrictions on the types of evidence which may be considered under each method.[6] Thus, nothing in the regulation limits the type of evidence which may be introduced in rebuttal.

The employer was afforded an evidentiary hearing under the Reform Act and its implementing regulations. It was provided ample opportunity to present evidence and to call witnesses to testify on its behalf. The employer has not pointed to any specific type of rebuttal evidence that it wished to adduce at the hearing but was precluded from submitting. To the contrary, there is no indication in the record that the employer was not allowed to submit any evidence it chose. Since employer was not hampered in the presentation of its case, it lacks standing to raise this argument before the Board.

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[6] Section 727.203(b) provides that the Section 727.203(a) presumption shall be rebutted if (1) evidence establishes that the miner is doing his usual work or comparable and gainful work; or (2) the evidence establishes that the miner is able to do his usual work or comparable and gainful work; or (3) the evidence establishes that the total disability or death of the miner did not arise in whole or in part from coal mine employment; or (4) the evidence establishes that the miner does not, or did not, have pneumoconiosis.

U.S. Steel Corp. v. Gray, 588 F.2d 1022, 1026 (5th Cir. 1979).

II

Since the interim presumption of Section 727.203(a)(1) is adjudged constitutional, and since employer concedes it was properly invoked, we must consider whether the administrative law judge erred in finding that the presumption was unrebutted. The employer specifically alleges that any pulmonary disability of the miner is slight and does not prevent him from performing his usual coal mine duties. The employer also contends that claimant's total disability is not due to dust exposure. Since the miner in the instant case is not employed and the employer conceded that the miner has clinical pneumoconiosis, only 20 C.F.R. §§ 727.203(b)(2) and (b)(3) are applicable. *See fn.* 6, *supra.*

The administrative law judge did not specifically discuss each of the methods of rebuttal. His rationale for finding the presumption unrebutted was as follows:

> The medical report (Operator's Exhibit 4), signed by Ralph J. Jones, M.D., and W. G. Hayes, M.D., who examined Claimant on October 13, 1975, found 'disability due to non-pulmonary conditions'; and 'occupational pneumoconiosis with a slight degree of impairment of capacity for work thereon.' Although there is additional evidence, including Claimant's own testimony, that his back condition, as well as a pulmonary embolus and a bout with pneumonia, have contributed, or may in fact be the more significant impairments, there is nothing in the record to controvert the finding that Claimant is totally disabled; and that his pneumoconiosis has contributed *at least in part* to this disability. The interim presumption therefore remains unrebutted, and the application of this presumption qualifies Claimant for benefits under the Act.
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> *Decision and Order*, p. 6. (Emphasis added.)

The administrative law judge appears to have interpreted rebuttal under Section 727.203(b) to be impossible where pneumoconiosis is only partially the cause of existing disability. We believe this reasoning stems from the language of Section 727.203(b)(3), which provides for rebuttal if it is established that the "total disability or death of the miner did not arise *in whole or in part* out of coal mine employment . . . ." 20 C.F.R. § 727.203(b)(3) (emphasis added). We further believe that Section 727.203(b)(3), insofar as it permits awards for disability caused only *in part* by diseases arising out of coal mine employment, is inconsistent with the Act and therefore invalid. Accordingly, the administrative law judge erred in his rebuttal analysis, an error which necessitates remand. My colleague, Judge Smith, concurs with this judgment.

From the inception of the black lung legislation in 1969, it has been Congress's declared purpose to compensate

> coal miners who are totally disabled due to pneumoconiosis and . . . the surviving dependents of miners whose death was due to such disease or who were totally disabled by this disease at the time of their death . . .

30 U.S.C. § 901(a). This purpose has remained unchanged throughout the administration of the black lung program,[7] and is reflected in prior regulations. *See* 20 C.F.R. §§ 410.412, 410.426.

Despite this, and without such a departure being authorized by statute, the Secretary of Labor has for the

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[7] The one exception is Section 411(c)(5), 30 U.S.C. § 921(c)(5), added to the Act in 1977. This provision provides a presumption of entitlement to certain miners' survivors which is rebutted only by showing that the deceased miner was not totally or partially disabled due to pneumoconiosis. This exception does not, however, alter the validity of our point in the instant case, since Section 411(c)(5), applies only to a narrow class of survivors.

first time promulgated a regulation which, when interpreted as did the administrative law judge in this case, permits awards of black lung benefits to claimants who are only *partially disabled* due to pneumoconiosis.

This is not in keeping with the Act, which requires that *total* disability be due to pneumoconiosis. 30 U.S.C. §§ 901(a), 902(f)(1). Permanent regulations promulgated under the Act have, until this point, always required that pneumoconiosis (clinical or presumptive), in and of itself, be totally disabling. *See* 20 C.F.R. §§ 410.412, 410.422 and 410.424.

Pneumoconiosis, by definition, is "a chronic dust disease of the lung . . . arising out of coal mine employment." 30 U.S.C. § 902(b). Section 727.203(b)(3) as written, however, permits the presumption to stand if only *part* of the disability arose out of coal mine employment, *i.e.*, only *part* of the disability need be due to pneumoconiosis. This would permit awards of benefits to claimants not *totally* disabled by pneumoconiosis in and of itself. Besides being inconsistent with the Act, this regulation's phraseology places upon employer a nearly impossible burden of proof in cases, such as the instant one, where pneumoconiosis is diagnosed. Under Section 727.203(b)(3), as written, the employer must show that *no part* of the total disability arose out of coal mine employment.

We think this is unjust to employer in that it exceeds the mandates of the Act. Consequently, we hold that, in order to rebut this presumption, an employer must show that the pneumoconiosis from which the miner suffers, be it true or presumed, is not in and of itself totally disabling. This is all the Act requires, and to the extent that 20 C.F.R. § 727.203(b)(3) departs from that requirement it is inconsistent with the Act.

Accordingly, Section 727.203(b)(3) should be read in future as though the words "in whole or in part" were

not part thereof, *i.e.*, the presumption is rebutted under Section 727.203(b)(3) if it is shown that total disability or death did not arise out of coal mine employment.

In the instant case, there is evidence which is relevant to rebuttal under both Sections 727.203(b)(2) and (3). This evidence includes three pulmonary function studies, one of which was termed normal by the interpreting physician (relevant to rebuttal pursuant to Section 727.203(b)(2)); *see Sykes v. Itmann Coal Co.*, 2 BLR 1-1089 (1980); Dr. Salon's December 1974 report diagnosing hypertension and probable coal workers' pneumoconiosis, and linking those conditions to coal mine employment (relevant to rebuttal pursuant to Section 727.203(b)(3)); and the October 1975 report of Drs. Hayes and Jones, in which the doctors diagnosed occupational pneumoconiosis with a slight impairment in work capacity and disability due to a non-pulmonary condition (probably a back problem) (relevant to rebuttal pursuant to Sections 727.203(b)(2) and (3)).

In light of our holding regarding rebuttal under Section 727.203(b)(3), we must remand this case for the administrative law judge to reconsider all the relevant evidence, especially that mentioned *supra*, under Sections 727.203(b)(2) and (3).

III

The employer next argues that the administrative law judge erred in awarding benefits to commence with the onset of disability in September 1974. Benefits should commence, employer contends, only with the enactment of the Reform Act on March 1, 1978.

We reject employer's arguments. The Reform Act clearly states that all claims which are pending or denied prior to the date of its enactment are to be reviewed under the new Reform Act criteria. 30 U.S.C. § 945; 20 C.F.R. §§ 727.101 and 727.102 (1979). The Act further provides that benefits may be awarded pursuant to

those claims as far back as January 1, 1974. 30 U.S.C. § 945(c).

The Supreme Court in *Usery*, *supra*, stated that statutes such as the one with which we are dealing are presumed constitutional. It is the employer's burden to establish that Congress acted in an arbitrary and irrational way. *Usery*, *supra*, at 15. The employer in the instant case has not met this burden, especially in view of the Court's rejection of a more serious due process retroactivity argument in *Usery*. *See Usery*, *supra*, at 16-20.

IV

We last address employer's argument that the administrative law judge erred in finding the claimant's stepdaughter, Evelyn, to be his dependent for purposes of augmented benefits under the Act. We reject this contention.

A record from the West Virginia Department of Vocational Rehabilitation indicates that in 1968 Evelyn was living with her mother and stepfather. Evelyn has a low I.Q., scoring 69, 75 and 67 on the various tests given her. She was unable to complete a vocational rehabilitation program successfully. The claimant testified that Evelyn had been diagnosed as mentally retarded in the fifth grade, and that she was considered as his disabled child for Social Security purposes. This last fact alone is enough to qualify Evelyn as the claimant's dependent for purposes of the Act. 30 U.S.C. §§ 902(g)(B)(i) and (ii).

Employer introduced no evidence to controvert the facts recited *supra*. Accordingly, we hereby affirm the administrative law judge's finding that Evelyn is the dependent of her stepfather, the claimant.

Accordingly, the Decision and Order is affirmed in part and vacated in part, and the case is remanded to the Office of Administrative Law Judges for reconsideration

of the question of rebuttal under 20 C.F.R. §§ 727.203 (b)(2) and (3). Should the presumption be found rebutted on remand, the administrative law judge must then proceed to consider the claimant's entitlement under the permanent criteria.

SO ORDERED.

MILLER, Administrative Appeals Judge, concurring:

I fully concur in the conclusion that the Section 727.203 (a) (1) presumption is constitutional. Since my own interpretation of Section 727.203 (a) (1) differs somewhat from that of Judge Kalaris, I must state my views separately.

For the reasons expressed in Part I of the opinion of Judge Kalaris, I agree that there is a rational relationship between the facts proved (x-ray evidence of pneumoconiosis and 10 years of coal mine employment) and the facts presumed (total disability due to pneumoconiosis arising out of coal mine employment).

However, it is my view that Section 402 (f) (2) of the Act, 30 U.S.C. § 902 (f) (2), requires that Section 727.203 (a) (1) must be interpreted to provide access to the interim presumption even to those miners with less than 10 years of coal mine employment when it can be established that their pneumoconiosis arose out of coal mine employment. *See* my dissenting opinion in *Lynn v. Director*, —— BLR ——, BRB No. 80-257 BLA (May 11, 1981). *See also* 20 C.F.R. §§ 410.490 (b) (1) (i) and (b) (2). Under these circumstances, the fact proved is x-ray evidence of pneumoconiosis and the fact presumed is total disability due to pneumoconiosis. My analysis indicates that Congress could, and did, conclude that there exists a rational relationship between x-ray evidence of pneumoconiosis and total disability due to pneumoconiosis, irrespective of 10 years of coal mine employment.

The Reform Act was motivated by Congressional dissatisfaction with misapprehension of the intent of the Act as enacted in 1969.

> The Black Lung Benefits Act of 1972 amended the basic law in several important respects; *generally broadening claimant eligibility* . . . . With respect to the changes broadening claimant eligibility, *it should be noted that the Committee initiated the 1972*

> *amendments in large part because of dissatisfaction with* the administration of the law by the Department of Health, Education, and Welfare (Social Security Administration), *which in some respects, clearly contravened discernible legislative guidelines.* The amendments proposed by H.R. 4544 rest on a comprehensive analysis of the program since its inception. *They are remedial in nature—in several instances again redefining misapprehended legislative intent. . . .* (*Emphasis added.*)

H.R. Rep. No. 151, 95th Cong., 1st Sess. 4 (1977), *reprinted in* 2 *U.S. Code Cong. and Admin. News* at 240 (1978).

There was already evidence before Congress in 1969 that miners with any degree of pneumoconiosis were not able to perform their usual coal mine employment. Congress was aware of the following remarks of the Surgeon General:

> Pneumoconiosis is a pathological condition of the lung induced by inhalation of small particles.
>
> There are many types of pneumoconiosis caused by specific kinds of dusty materials, as, for example, silica and cotton fibers. Coal miners' pneumoconiosis is a chronic chest disease, caused by the accumulation of fine coal dust particles in the human lung. In its advances [sic] forms, it leads to severe disability and premature death.
>
> Coal miners' pneumoconiosis was recognized, in Great Britain as early as 1943, as a disease entity separate from silicosis. It was not generally recognized as such in the United States until the 1950's. Prevalence studies by the Pennsylvania Department of Health (1959-61) and by the Public Health Service (1963-65) confirmed the existence of the disease entity, documented its prevalence among coal miners, and showed that it is a widespread problem.

Coal miners' pneumoconiosis is a distinct clinical entity, resulting from inhalation of coal dust. Physicians diagnose it on the basis of X-ray evidence of nodules in the lungs of a patient with a history of long exposure to coal dust. However, it should be pointed out that data from postmortem examinations indicate a higher prevalence of the disease than can be diagnosed from X-ray examinations.

Physicians classify coal miners' pneumoconiosis as simple or complicated, depending on the degree of evidence in the X-ray picture. In the simple form, pinpoint, micronodular or nodular lesions distributed throughout the lungs show up in the X-ray picture.

The physician decides the radiological category of simple pneumoconiosis on the basis of the extent of the opacities. There are no specific symptoms, and pulmonary function tests seldom enable the physician to say whether or not the patient has the disease. It is generally accepted by physicians that simple pneumoconiosis seldom produced significant ventilatory impairment, but, the pinpoint type may reduce the diffusing capacity, the ability to transfer oxygen into the blood.

Complicated pneumoconiosis is a more serious disease. The patient incurs progressive massive fibrosis as a complex reaction to dust and other factors, which may include tuberculosis and other infections. The disease in this form usually produced marked pulmonary impairment and considerable respiratory disability.

Such respiratory disability severely limits the physical capabilities of the individual, can induce death by cardiac failure, and may contribute to other causes of death.

Medical researchers in both Britain and the United States have repeatedly shown that coal miners suffer

> from more respiratory impairment and respiratory disability than does the general population. These respiratory problems are frequently accentuated by chronic bronchitis and emphysema, the causative factors of which remain to be clarified.
>
> *There is no specific therapy for pneumoconiosis in either its simple or complicated form. Adequate environmental dust controls, use of respirators, or removing the miners from the dusty environment as soon as they show minimal effects appear to be, under present technology, the only helpful preventive procedures.* (Emphasis added.)

H.R. Rep. No. 563, 91st Cong., 1st Sess., at 15-16 (1969); *see also* S. Rep. No. 411, 91st Cong., 1st Sess., at 7-8 (1969). It is not disputed that the effects of both simple and complicated pneumoconiosis are irreversible. *See, e.g., Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 7 (1976). Moreover, all stages of pneumoconiosis are progressive when there is continued exposure to coal dust. *Id.*; *Crofton and Douglas, Respiratory Diseases*, 512 (2d ed. 1975).

With this background in mind, it is important to note that the term "total disability" under the Act encompasses the inability to engage in usual coal mine work or comparable and gainful work. *See* 20 C.F.R. § 410.412.

In light of the following factors presented to Congress:

(1) The existence of pneumoconiosis can be diagnosed (and, in fact, is underestimated) by x-ray evidence.

(2) The deleterious effects of pneumoconiosis are irreversible and progressive upon further exposure to coal dust.

(3) There is no specific therapy for pneumoconiosis.

(4) The only helpful preventive procedures are adequate environmental dust controls, use of respirators, or removal of the miners from the dusty environment as soon as they show minimal effects of pneumoconiosis.

I conclude that it was eminently reasonable for Congress to determine that the diagnosis of a disease, which upon further exposure to coal dust may irreversibly progress to produce severe impairment or death, does bear a rational relationship to the inability to work in a dusty environment, *i.e.*, coal mine employment. Furthermore, by its mandate in Section 402(f)(2) of the Act, 30 U.S.C. § 902(f)(2), Congress did so conclude, even with regard to miners having less than 10 years of coal mine employment, when their pneumoconiosis arose out of such employment. *See* my dissenting opinion in *Lynn*, *supra*. As the Supreme Court noted in *Usery*, "We cannot say that it would be irrational for Congress to conclude that impairment of health alone warrants compensation." 428 U.S. at 23.

In the context of Section 727.203(a)(1), the Department of Labor did not choose to compensate for impairment of health alone, but rather to compensate for the disease pneumoconiosis, as diagnosed by x-ray evidence, unless, for example, the rationally presumed inability to work in a dusty atmosphere does not leave the miner totally disabled. That is, unless it is established that the miner is doing, or is capable of doing, his usual coal mine work or comparable and gainful work. *See* 20 C.F.R. §§ 727.203(b)(1) and (2). The employer can thus rebut the interim presumption by establishing that the miner is doing, or is capable of doing, his usual coal mine work as in showing that the miner is doing, or is able to do, coal mine employment which, by the use of respirators or adequate environmental dust controls, does not involve medically contraindicated dust exposure. Similarly, the

employer can rebut the interim presumption by establishing that the miner is doing, or is capable of doing, comparable and gainful work.[1]

Since Congress mandated that the Department of Labor promulgate 20 C.F.R. Part 727 so as to be no more restrictive than the criteria applicable to a claim filed on June 30, 1973, the presumption of 20 C.F.R. § 727.203, to the extent that it is not more restrictive than the criteria of 20 C.F.R. § 410.490, does effectuate the Congressional mandate. *See* Section 402(f)(2), 30 U.S.C. § 902(f)(2). That mandate is based on the rational conclusion that the existence of pneumoconiosis as diagnosed by x-ray evidence bears a relationship to the inability to work in a dusty environment. Finally, Congress could choose to compensate for that inability, or perhaps, for the impairment of health alone. *Usery*, 428 U.S. at 23.

Since there was evidence before Congress that the diagnosis of pneumoconiosis by x-ray did indicate the inability to work in a dusty environment, the presumption of Section 727.203(a)(1) is constitutional. *Usery, supra.* Entitlement based on the Section 727.203(a)(1) presumption would be constitutionally unassailable even if the presumption were irrebuttable had Congress so mandated. The party opposing entitlement cannot reasonably object to the Department of Labor's provision of rebuttal means for the presumption, thus limiting compensation to a less pervasive scope than could be reached by the Congress.

I further concur that this case must be remanded to the administrative law judge. However, I do not agree

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[1] This Board has held that once a miner is unable to do his usual coal mine work (as is presumed from the proven fact in Section 727.203(a)(1)) the burden of establishing that the miner is not totally disabled by reason of the ability to do comparable and gainful work must be borne by the employer. *See Fletcher v. Central Appalachian Coal Co.*, 1 BLR 1-980 (1978); *Sturnick v. Consolidation Coal Co.*, 2 BLR 1-973 (1980).

with the rationale of my colleagues. Rather, I would hold that the administrative law judge's sole error was in failing to determine whether, ignoring *non-respiratory and non-pulmonary* conditions, claimant was totally disabled. *See* 20 C.F.R. § 727.202. This error does require remand for further consideration of rebuttal pursuant to Section 727.203(b)(3), but in no way places into issue the validity of Section 727.203(b)(3). Therefore, while noting that Subsection (b)(3) does appear consistent with the Act, I would address the validity of this regulation in an appropriate case where the underlying definitions of Section 727.202 are properly applied.

In other respects, I concur in the opinion of Judge Kalaris.

SMITH, Chief Administrative Appeals Judge, concurring in part and dissenting in part:

This appeal presents an important issue of first impression that challenges the constitutionality of the Section 727.203(a)(1) interim presumption, which is contained in the Secretary of Labor's interim regulations implementing the Black Lung Benefits Reform Act of 1977. 20 C.F.R. § 727.203. The Black Lung Benefits Reform Act of 1977 made substantial changes to various provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. § 901 *et seq.* (hereinafter, the Act).

I cannot concur with the majority's conclusion that the 20 C.F.R. § 727.203(a)(1) interim presumption is constitutionally valid since in my view the Section 727.203 (a)(1) presumption does not meet the review standard set by the Supreme Court for such presumptions. The proper standard for reviewing the constitutionality of Section 727.203(a)(1) is whether there is "some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 28 (1976), *citing Mobile, Jackson & Kansas City Rail Co. v. Turnipseed*, 219 U.S. 35, 43 (1910).[1]

In making that determination of rationality, "significant weight should be accorded the capacity of Congress to amass the stuff of actual experience and cull conclusions from it." *Id. citing United States v. Gainey*, 380 U.S. 63, 67 (1965). When the Supreme Court, in *Turner Elkhorn*, held a rational basis existed for the legislative presumptions in Sections 411(c)(1), (2), (3), and (4)

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[1] The validity of a regulatory presumption is to be determined by the standard applicable to statutory presumptions. *Atwood's Transport Lines, Inc. v. United States*, 211 F. Supp. 168 (D.D.C. 1962), *aff'd* 373 U.S. 377 (1963).

of the Act, 30 U.S.C. §§ 921(c)(1), (2), (3) and (4), it did so after determining that the legislative record contained specific medical, scientific, or other testimony to support each presumption, *see id.* at 29-34.

Therefore, for us to uphold Section 727.203(a)(1) the legislative record must demonstrate a rational connection between the presumption of total disability and either evidence of 10 years of coal mine employment or a chest x-ray showing simple pneumoconiosis. After extensive examination of the legislative record, I cannot conclude, as does the majority, that the testimony, medical reports, or other documentation before Congress establish a rational basis for the presumption of total disability contained in Section 727.203(a)(1).[2]

The presumption of total disability cannot rest upon evidence that a claimant had 10 years of coal mine employment because the evidence before Congress fails to establish any correlation between years of coal mine employment and the development of total disability due to pneumoconiosis.

At best the evidence presented to Congress indicates that it takes 10 to 15 years of underground mining for coal miners even to begin to develop coal workers' pneumoconiosis.[3] Black Lung Benefits Reform Act, 1976, Hearings before the Senate Committee on Labor and Public Welfare, 94th Cong., 2d Sess. 681 (1976) (Report

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[2] My objection to Section 727.203(a)(1) extends only to that part of the regulation which presumes total disability from x-ray evidence of pneumoconiosis and 10 years of coal mine employment. That portion of Section 727.203(a)(1) which presumes that death is due to pneumoconiosis meets the standard of rationality in *Turner Elkhorn*. *See, infra* at 28-29.

[3] In fact, the report submitted by the National Academy of Sciences to the Senate Subcommittee on Labor found that ". . . the occurrence of the disease after only eight to ten years of underground exposure is exceptional." Hearings: Reform Act at 681, 1976.

to the National Academy of Sciences) (hereinafter, Hearings: Reform Act, 1976).

The National Coal Workers' Autopsy study at the Appalachian Laboratory for Occupational Respiratory Disease found that the percentage of cases of pneumoconiosis begins to increase sharply after a miner has worked 15 years in the mines, H.R. Rep. No. 770, 94th Cong., 1st Sess. 71 (1975) *reprinted in* the *Legislative History of the Reform Act* at 184 (1979), a finding which parallels the conclusion of the Surgeon General's Report to Congress that the occurrence of pneumoconiosis is spotty for work periods of less than 15 years.[4] S. Rep. No. 743, 92nd Cong., 2d Sess. at 13 (1972).

In *Turner Elkhorn*, this evidence, that the incidence of pneumoconiosis increases in cases of miners with 10 years of coal mine employment, was held sufficient to establish a rational basis for the presumptions in Sections 411(c)(1) and (2) of the Act. *See* 428 U.S., *supra* at 29. However, as the Supreme Court cautioned:

> It is worth repeating that mine employment for 10 years does not serve by itself to activate any presumption of pneumoconiosis; it simply serves along with proof of pneumoconiosis under § 411(c)(1) to presumptively establish the cause of pneumoconiosis, and along with proof of death from a respirable disease under § 411(c)(2) to presumptively establish that death was due to pneumoconiosis.

428 U.S. at 29.

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[4] The lowest figure in fact advocated as an objective measure for determining eligibility for benefits was 15 years. H.R. Rep. No. 770, 94th Cong., 1st Sess. at 72 (1975). Otherwise, the figures cited as the point at which coal miners should be entitled to benefits ranged from 25 to 30 years of coal mine employment. H.R. Rep. No. 770, 94th Cong., 1st Sess. at 6 (1975); Black Lung Benefits Reform Act of 1976, Hearings before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 94th Cong., 2d Sess. at 143 (1976).

Therefore, while the Supreme Court found Sections 411 (c) (1) and (2) to be constitutionally valid, it did so because duration of employment was used to establish causality. The basis of my objection to Section 727.203 (a) (1) is not the use of 10 years to establish causation, which the presumption does, but the use of duration of employment to go one step further and establish total disability.

Therefore, while this evidence indicates that the prevalence of pneumoconiosis may increase after 10 to 15 years of coal mine employment and supports a presumption of causality as in *Turner Elkhorn*, nowhere does the evidence in the legislative record establish a relationship between years of employment and disability. As the report of the Senate Committee on Labor and Public Welfare concluded, after review of the evidence before it, "there is no clear causal relationship between duration of employment and the incidence of total disability due to pneumoconiosis." S. Rep. No. 209, 95th Cong., 1st Sess. at 17 (1977), *reprinted in* the *Legislative History of the Reform Act* at 620 (1979). I, therefore, cannot conclude that a rational connection exists between 10 years of coal mine employment and the presumption of total disability.

I also cannot find evidence in the legislative record to establish a rational connection between an x-ray showing simple pneumoconiosis and the Section 727.203 (a) (1) presumption of total disability. The testimony before Congress demonstrates that the chest roentgenogram is merely a tool to identify the existence of pneumoconiosis; it does not measure the functional capacity of a miner.

Dr. Lorin Kerr, Medical Director, Department of Occupational Health, United Mine Workers of America, in hearings before the Senate Subcommittee on Labor specifically stated that an x-ray "should never be used to determine the presence or severity of respiratory disabil-

ity." Hearings to amend Title IV of the Federal Coal Mine Health and Safety Act of 1969 before the Subcommittee on Labor of the Senate Subcommittee on Labor and Public Welfare, 92nd Cong., 1st and 2d Sess. at 42 (1972).

Dr. Donald L. Rasmussen, an acknowledged expert in the field of pulmonary testing,[5] likewise testified before the House Subcommittee on Labor that ". . . impairment in function is unrelated to x-ray findings."[6] Hearings to amend Title IV of the Federal Coal Mine Health and Safety Act of 1969 before the General Subcommittee on Labor of the House Committee on Education and Labor, 92d Cong., 1st Sess. 101 (1971). A similar conclusion was reached in a report submitted by the National Academy of Sciences that "the chest x-ray is not a useful means of assessing the functional status of the lung nor of determining disability." Hearings: Reform Act at 681, 1976.

As there is no correlation between an x-ray identification of pneumoconiosis and disability, Dr. Bedford Bird, former Deputy Director, Department of Occupational Health, United Mine Workers of America, testified that other tests are absolutely necessary to determine the extent of pulmonary impairment. Hearings before the Subcommittee on Labor of the Senate Committee on Human Resources, 95th Cong., 1st Sess. at 36 (1977). This testimony demonstrates that there is no medical basis on which to presume total disability from an x-ray showing of simple pneumoconiosis.

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[5] *See Morris v. Mathews*, 557 F.2d 563, 569 (6th Cir. 1977); *Davis v. Califano*, 473 F. Supp. 941, 745 (S.D. W.Va. 1979).

[6] In conjunction with his testimony, Dr. Rasmussen submitted a study which concluded the x-ray is of little value in evaluating functional capacity. Hearings before the General Subcommittee on Labor of the House Committee on Education and Labor, 92d Cong., 1st Sess. at 161 (1971).

In face of the overwhelming evidence in the legislative record that there is no medical basis for presuming total disability based upon 10 years of coal mine employment and an x-ray showing of simple pneumoconiosis, I cannot conclude that there is a rational basis for the Section 727.203(a)(1) interim presumption. The majority, however, finds sufficient evidence before Congress to link total disability in a miner with simple pneumoconiosis established by x-ray alone, and thus uphold the constitutionality of Section 727.203(a)(1). Again, I cannot agree.

While the testimony relied upon by the majority suggests that simple pneumoconiosis may cause some functional impairment in a miner, *see* 117 CONG. REC. 40430 (1971), *reprinted in* the *Legislative History of the Federal Coal Mine Health and Safety Act of 1969*, 94th Cong., 1st Sess. at 1805 (1975), it does not demonstrate that simple pneumoconiosis diagnosed by x-ray is, or can be, totally disabling. It must be remembered that except for Section 411(c)(5) of the Act, 30 U.S.C. § 921(c)(5), benefits are payable *only* if pneumoconiosis causes *total disability*. I, therefore, cannot conclude that this evidence provides a rational basis for Section 727.203(a)(1) which contains a presumption of *total, not partial, disability*.

The medical testimony before Congress, in fact, demonstrates that disability is not clearly linked to simple pneumoconiosis.[7] The Surgeon General testified that "simple pneumoconiosis seldom produces significant ventilation impairment . . ." S. Rep. No. 1254, 94th Cong., 2d Sess. 4 (1976), *reprinted in* the *Legislative History of the Reform Act* at 34 (1979).

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[7] The Supreme Court in *Turner Elkhorn* also recognized that "[s]imple pneumoconiosis . . . is generally regarded by physicians as seldom productive of significant ventilatory impairment." 428 U.S. at 7.

Dr. Harvey Phelps also testified that "disability as measured by the prevalence of symptoms, recurrent chest illnesses or levels of ventilatory function, is not closely related to the degree of simple coal workers' pneumoconiosis nor to life time dust exposure." Hearings before the General Subcommittee on Labor of the House Committee on Education and Labor, 92d Cong., 1st and 2d Sess. at 199 (1974). These conclusions parallel the findings of a study completed for the National Academy of Sciences that simple coal workers' pneumoconiosis may cause functional impairments but that these impairments do not result in a coal worker's disability. Hearings: Reform Act at 681, 1976.

Even the testimony of Dr. Lorin Kerr, cited by the majority, indicates that *significant ventilatory changes* seldom occur before grade 3 simple pneumoconiosis.[a] 117 CONG. REC. 40430 (1971), *reprinted in Legislative History of the Federal Coal Mine Health and Safety Act of 1969*, 94th Cong., 1st Sess. at 1805 (1975).

Perhaps no more persuasive evidence exists, however, than the acknowledgment by the Social Security Administration before the Senate Subcommittee on Labor that the 20 C.F.R. § 410.490 interim criteria, which the Section 727.203 regulations track, were not necessarily drafted to describe a level of impairment which would impose a functional limitation on the individual. Oversight Hearings of the Administration of the Black Lung

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[a] Simple pneumoconiosis is classified into categories 1, 2, and 3 according to the profusion of small opacities in the lung fields. The radiographic classification of grade 3 simple pneumoconiosis would be 3/3. *See* Morgan and Lapp, "Respiratory Disease in Coal Miner," 113 *American Review of Respiratory Disease*, 535 (1976). In this case, the effect of Section 727.203(a)(1) is to grant a presumption of total disability to a claimant whose radiographic (x-ray) reports vary from 0/0 to 2/2. There is no evidence in the legislative record which demonstrates that such simple pneumoconiosis diagnosed by x-ray causes functional impairments in a miner resulting in total disability.

Program before the Subcommittee on Labor of the Senate Committee on Human Resources, 95th Cong., 1st Sess. at 194 (1977) (statement of Dr. Herbert Blumenfeld). According to the Social Security Administration, the criteria were designed only to detect the presence of simple coal workers' pneumoconiosis. The purpose of the criteria was to clear away the backlog of cases under the 1972 amendments and to meet Congressional pressure for greater administrative efficiency. *See* S. Rep. No. 1254, 94th Cong., 2d Sess. at 10 (1976). The constitutionality of the Section 410.490 interim criteria was never challenged.

In light of the above evidence, it is clear that the Section 727.203(a)(1) interim presumption does not meet the constitutional requirement that a rational connection exist between the fact proved and the fact presumed. The presumption of total disability cannot be based on a showing of 10 years coal mine employment. The statistics before Congress indicate that pneumoconiosis is more prevalent among miners who have spent a substantial number of years underground. However, no correlation ever was established between 10 years of coal mine employment and the total disability of a miner.

Similarly, the presumption of total disability cannot be based on x-ray evidence of pneumoconiosis. As the testimony and reports emphasized, the x-ray is only a tool to identify the existence of pneumoconiosis. It does not measure a miner's disability. The Social Security Administration's acknowledgment that the 20 C.F.R. § 410.490 criteria were designed to detect the presence of pneumoconiosis, rather than to measure disability, further indicates that there is no medical basis for presuming total disability from an x-ray positive for simple pneumoconiosis.

The evidence in the legislative record on the disabling effects of simple pneumoconiosis provides us with the only potential basis for sustaining the Section 727.203

(a)(1) interim presumption. The evidence favorable to the presumption, however, suggests only that *simple pneumoconiosis can cause some functional impairment, particularly in its later stages, not that simple pneumoconiosis is totally disabling.* The testimony before Congress, therefore, does not provide a rational basis for the Section 727.203(a)(1) interim presumption. Left with no evidence upon which to hold the Section 727.203 (a)(1) presumption constitutional, I would find that it effects a denial of due process to the employer in this case.

Assuming arguendo that Section 727.203(a)(1) is constitutional, I concur with Judge Kalaris' determination that the "in part" language of Section 727.203(b) is inconsistent with the intent and purpose of the Reform Act. Since it allows entitlement to benefits on a showing of less than total disability, it must be invalidated.

Dated this 10th
day of June 1981